Public Utilities FORTNIGHTLY

October 31, 1929

128 PAGES *of timely and useful information about the economic, political, legal, and financial aspects of regulation.*

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WASHINGTON, D. C.

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Public Utilities Fortnightly

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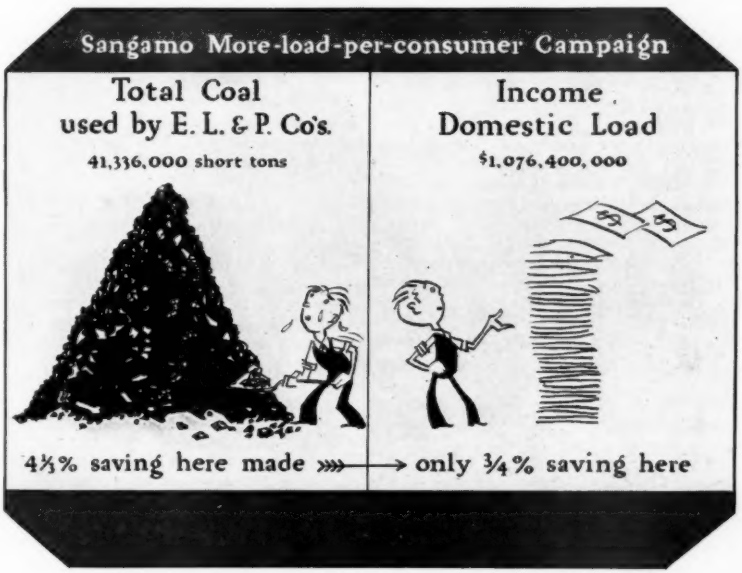

SANGAMO

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Pages with the Editors

FOR several years we have been hearing a good deal about the so-called "Massachusetts theory" of regulating public utilities.

* *

TRUE to her traditions, the Commonwealth of Massachusetts has approached her regulatory problems with that spirit of detachment and independence that has been characteristic of the State which for three hundred years has been known as the "Cradle of Liberty."

* *

WHEN the Supreme Court ruled that public utility companies are entitled to a fair return on the present value of their property, the Massachusetts Commission determined, nevertheless and notwithstanding, that this ruling should not be allowed to supersede their own decision that the returns should be based upon the investment.

* *

THE points at issue were brought to a head when a public utility company challenged the Massachusetts practice by an appeal to the courts.

* *

THIS controversy—which involves many factors and considerations that have received but occasional and fragmentary attention in the newspapers—has become so significant that the editors of PUBLIC UTILITIES FORTNIGHTLY asked DR. IRSTON R. BARNES, of Yale University, (who had made a careful study of the situation) to write a comprehensive summary of the case, and to point out how it developed, what the salient points at issue were once and now are, and what the present status of the controversy is.

* *

THE first of a series of two excellent articles from DR. BARNES is published on pages 540-551 of this number, under the general title "The Challenge of the Massachusetts Commission."

* *

IN this first article the author outlines the historical development of the situation and explains Massachusetts' attitude toward public utility security issues and toward prudent investment.

* *

IN the coming issue of PUBLIC UTILITIES FORTNIGHTLY—dated November 14th—DR. BARNES will interpret Massachusetts' attitude on the "fair value" rule.

THESE two articles constitute real and timely contributions to the literature of this live controversy; they will be included in DR. BARNES' forthcoming book "Public Utility Control in Massachusetts; a Study in the Commission Regulation of Security Issues and Rates," shortly to be published by the Yale University Press.

* *

ANOTHER controversial subject that is attracting considerable newspaper attention just now is the St. Lawrence River power project; in both its economic as well as its political phases it is assuming major proportions.

* *

IN the discussions of the problem as to whether the enterprise should be undertaken by the State or by private companies operating under State regulation, the term "for the people" has come into such frequent use as to attain head-line prominence.

* *

IT is a glib phrase—but "a bit obtuse in its connotations," as our old professor of English used to observe.

* *

APPARENTLY some folks conclude that there is a danger that the power developed by the proposed St. Lawrence River project will, in some way not quite clear, be made inaccessible to the people.

* *

JUST why either the State or a private corporation should want to develop water power for any purpose except "for the people," or why the project can be considered sound on either an economic or financial ground, unless the power developed is placed at the service of the people, is one of the puzzling questions which will be treated in the coming number of this magazine.

* *

THE problems incidental to the regulation of public utilities are so many and so controversial that sometimes the editors can determine the real character of an opinion only after it has had the test of publication.

* *

A REALLY live subject is as sure to elicit a reaction from our readers as a live electric wire.

* *

WHICH recalls the simple method em-

(Continued on page VIII)

ployed by one inspired genius (not an editor) for finding out which wire *was* live.

* *

"HEY Bill!" he called, "grab hold of one of those wires."

"All right," said Bill, "I got one."

"Feel anything?"

"Nope."

"Good! I wasn't sure which was which. Don't touch the other one. It's got 6,000 volts in it."

* *

ELLSWORTH NICHOLS, whose article "What Is a Private Corporation's Right to Privacy" appears on pages 524-537 of this number, is of the editorial staff of PUBLIC UTILITIES FORTNIGHTLY.

* *

MILLIONS of American dollars are invested in public utility enterprises in Germany.

* *

How "secure" are these securities?

* *

How are the German public utility corporations being managed? How are the German people thriving? Are their street railways and bus services and other forms of utility services likely to grow and make money for their American stockowners?

* *

THESE are but some of the questions answered in the coming issue of this magazine by JOHN T. LAMBERT, an experienced newspaper man and consequently a shrewd observer, who has just returned from abroad with some first-hand impressions that he will share with the readers of PUBLIC UTILITIES FORTNIGHTLY.

* *

NOT only gas and electric utilities but also water utilities are interested in promotional rates; consequently the fact that the Missouri Commission has placed its stamp of approval upon a rate schedule for manufacturers, for the purpose of promoting business, is a matter of real interest. (See page 129 of the "Public Utilities Reports" section in this issue).

* *

THE Commission has also ruled that a laundry, although it uses a large quantity of water, is not entitled to be classified as a "manufacturer" for the purpose of obtaining reduced rates.

* *

THE words "merger" and "consolidation" have often been used as if they were synonymous. The Maine Commission in the Eastport Water Company Case points out the difference between these two words. (See page 136).

THE supply and service of water is a peculiarly localized function. For this reason the Maine Commission has denied an application for authority to consolidate certain water companies operating in widely separated communities; the economic advantages usually accruing to coalition are held to be lacking. (See page 136).

* *

THE conflict of powers of the State Public Service Commission and local governing boards is involved in a recent decision by the New Hampshire supreme court. (See page 160). It is held that the Commission cannot deny a petition for authority to acquire electric property because of the fact that town selectmen have refused to permit the maintenance of structures in the highway, in view of the superior powers of the Commission.

* *

COMPARISON of rates, proposed by a company petitioning for authority to acquire electric property of another company, with rates of a company filing a similar petition, (according to the New Hampshire supreme court), is proper evidence in such a proceeding.

* *

IT is the purpose of the Tennessee Commission to foster the development of natural resources to the fullest extent possible. This object is given weight in determining which of two companies should be authorized to develop a hydroelectric project. (See page 175).

* *

THE right of a company which has not yet become a public utility to condemn property for a hydroelectric project has been passed upon by the Tennessee Commission.

* *

"IN my judgment," writes the Hon. O. P. B. JACOBSON to the editors of this magazine, "PUBLIC UTILITIES FORTNIGHTLY covers public utility information not heretofore touched upon by other periodicals. Articles in it express the views on all sides of an issue. . . . . The soundness of your editorial policy certainly meets with my approval."

* *

FOR the benefit of those readers who may be careless enough to loan their copies of PUBLIC UTILITIES FORTNIGHTLY to persons who don't return them to the files, it may be observed that the leading contributions to this magazine may be found listed in the "Industrial Arts Index," which records monthly the more important articles that appear in the review magazines and in the technical and trade press.

—THE EDITORS.

OCTOBER

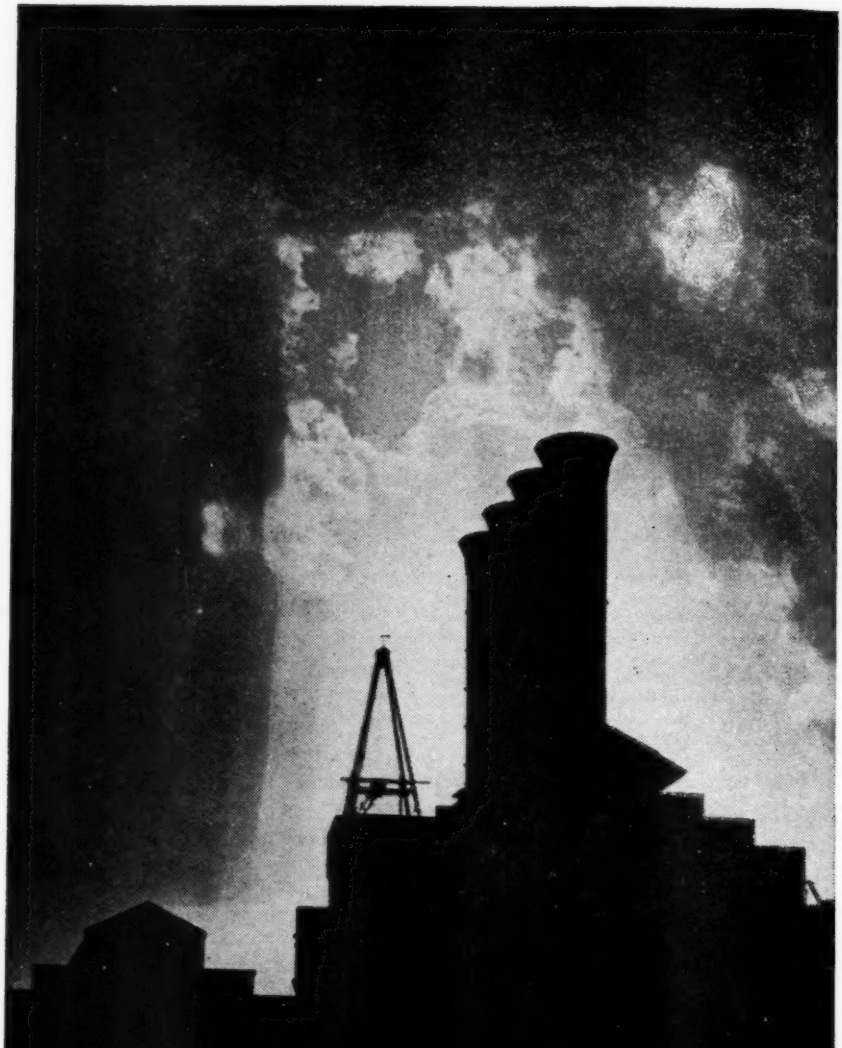
Reminders of Coming Events — **Utilities Almanac** — *Notable Events and Anniversaries*

31	T*h*	The *General Pike,* Cincinnati's first steamboat, opened steam transportation in the West on its pioneer journey to Louisville, with 31 passengers; 1819.

NOVEMBER

1	F	Interstate transportation by air was started on a permanent basis by the Stout Air Service, Inc., with a daily schedule between Detroit and Cleveland, 1927.
2	S*a*	Ten cents a pound on overland transportation of merchandise was paid by Southern merchants when the British cut off navigation between N. Y. and Philadelphia, 1812.
3	S	The first authoritative study of the costs of supplying electricity was published by DR. JOHN HOPKINSON of England, 1892.
4	M	Seven gas companies of Brooklyn, New York, combined to form the Brooklyn Union Gas Co., with a capitalization of $30,000,000; 1895.
5	T*u*	A group of enterprising Chicagoans created a company for supplying their city with water piped through logs, 1840.
'6	W	Two brothers named PACKARD, manufacturers of electric lights and electric supplies in Warren, Ohio, built an automobile and decided to enter the motor car business, 1899.
7	T*h*	¶ *The Public Ownership League of America will hold a Public Ownership Conference at Muscle Shoals, Ala., November 20–22, 1929.*
8	F	The first sleeping car acquired by the Northern Pacific Railroad was put into regular service, 1881.
9	S*a*	The fundamental patent on the American vestibuled railroad car was issued to H. H. SESSIONS, a Chicago inventor, 1887.
10	S	The *Governor Stanford,* the first locomotive of the Pacific Lines, went into regular service over the tracks of the Central Pacific Railroad Co., 1863.
11	M	The Western Edison Light Co. of Chicago—the third power plant in the country—began operation; 1882. SAMUEL INSULL was born, 1859.
12	T*u*	The famous locomotive *John Bull* made its initial trip near Bordentown, N. J., on the Camden & Perth Amboy Railroad, now part of the Pennsylvania System, 1831.
13	W	Experiments in radio communication, conducted by GUGLIELMO MARCONI at his first station on the Isle of Wight, covered a range of 14½ miles, 1897.

"Regulation is constantly drawing the public and the utilities closer together and paving the way for the sort of co-operation which will be to the greatest advantage of both." —LOUIS L. EMERSON, *Governor of Illinois.*



From a photograph by H. G. Coster

"Potential Power"

A remarkable camera study with a double motive—the sun-burst, symbolic of Nature's source of all power, and the power plant, symbolic of Man's handiwork.

Public Utilities
FORTNIGHTLY

VOL. IV; No. 9 OCTOBER 31, 1929

The PUBLIC UTILITIES AND THE PUBLIC

IN all of our cities, the good old comfortable days when the telephone operator woke us up in the morning, told us what time it was, and reminded us of our appointment with the dentist are gone forever. In a few small rural communities where the central operator does more knitting than operating, she may still be glad to tell you what time the 5 o'clock local for the city leaves, or where the big fire occurred that brightened the sky of the previous evening. But for the most part reasonably efficient telephone service demands that a company forego these pleasing courtesies.

It was with some reluctance that the telephone companies in our larger cities enforced the rule some years ago against giving the right time over telephones (or the wrong time either). It was only after surveys had conclusively shown that this small favor constituted an expensive and unnecessary part of the regular service.

In fact telephone companies are only too glad to render the greatest amount of service to their subscribers consistent with efficiency. That is why one can still find out the right time from the operator at Quigley Corners, Iowa, and on the other hand, be directed to call Western Union by the operator in New York city. In the latter case, "correct time" calls slow up the service to the tune of many thousands of dollars a year. In the former case it merely furnishes a welcome divertisement for a bored young lady.

A very interesting experiment in telephone service is being tried at the time of this writing in Buffalo, New York. On October 14th, there was placed into effect a "Leave Word Service." If it is found satisfactory after a trial period, the service is to be extended to the city of Rochester, New York, and other places.

This service has many unique possibilities, one of which might be the elimination of the expense of an office boy whose principal activity besides reading detective stories is to "answer the phone." It should be a real boon to batchelor doctors and other unmarried citizens whose businesses subject them to calls twenty-four hours a day. In short, individual line subscribers, either business or residence, and private branch exchange subscribers will be relieved of the necessity of remaining at home or at business to receive important phone messages by the new service.

According to press reports of the new experiment, special operators employed by the telephone company will be authorized to give or receive brief messages that will assist a person to get in communication with the subscriber. Furthermore, when the subscriber returns, the company will transmit the name and number of anyone who called in the subscriber's absence. No lengthy messages will be transmitted. Party lines will be excluded from the service and special rates have already been filed with the New York Public Service Commission.

Speaking of the legal aspects of this service, such reported authorities, as have any bearing on the point, seem to indicate that the telephone companies may properly establish such service as long as it is paid for by those who use it. The old "correct time" was discriminatory because it placed the burden upon all the subscribers most of whom kept their own time. The new service will stand on its own feet.

A Tennessee Electric Company Becomes the Victim of Its Own Franchise

EVERY now and then an incident happens in utility affairs which demonstrates what a gambling proposition the term franchise may be. Term franchises are usually solemn and binding contracts by which a utility is obligated to serve a community and the community in turn is obligated to afford the utility protection from competition for a term of years.

The advent of Commission regulation with its superior powers over rates and service took a considerable portion of the danger out of franchises in many states by permitting an equitable adjustment of rates from time to time to meet the fluctuations of costs and values.

But the "term" aspect of the franchise continues to be a two-edged sword. It may turn against a municipality wishing itself to engage in the utility business or, on the other hand, it may cause a utility at the expiration of its franchise to be at the mercy of the municipality which is then in a position to tell the utility to clear out unless the former's new terms are met.

A utility business is usually a permanent form of enterprise. The butcher, baker, and candle-stick maker can change the scene of their respective endeavors without any necessarily severe loss of investment, but a street railway or electric utility has

its entire capital literally spiked to the ground.

Some years ago the city of Detroit bought a complete traction system for a bargain simply because the utility owning it had come to the end of its franchise and the city refused to renew it. The company either had to sell to the city at its own figure or tear up the system and sell it to the junk man.

The most recent victim of the term franchise appears to be the Southern Cities Power Company which has furnished power and light for the citizens of Franklin, Tennessee, for the past twenty years. Its contract expired on August 4, 1929. Thereupon a newly organized Franklin Power & Light Company, owned by the stockholders of the Franklin Interurban Railway, proposed a plan to the city council involving the operation of the interurban railway, which admittedly is in a bad financial situation, with the granting of the power franchise. In this way, the losses sustained in the interurban properties would be shared by the profits from the power and light business. This plan was approved by the city council and a franchise was granted.

The Southern Cities Company, however, protested before the Tennessee Commission against the approval of the new franchise which excluded the Southern Cities Company from the use of Franklin streets and virtually notified them to remove all their equipment to make way for the new company. The old company contended that the state laws protected them so long as they continued to furnish satisfactory service to the city, and that the sudden disenfranchisement by the city council was illegal under the state statute prohibiting competition between public utilities where one was giving sufficient service.

The Commission overruled the contentions on the ground that the old company's own charter left them liable to just such a condition. There were two acts in Tennessee available to the Southern Cities Company which elected to incorporate under a 1909 act requiring the company "first to obtain permission from the governing power of any town in order to have the authority to occupy the streets of that town." An alternative act of 1895 under which the old company did not elect to proceed did not require the corporation to receive city approval for the use of the streets. The Commission said:

> "The Tennessee acts, therefore, expressly recognize the right and power of the municipalities of the state, otherwise having the power by charter, to initiate by ordinance the matter as to what particular public utility shall occupy the streets of such city, but after the ordinance is passed and the franchise thereby granted, it is incumbent upon the municipality and the holder of the franchise to submit such ordinance for approval of this Commission before the same shall be valid."

Another angle of this situation is the fact that the new company was given the city council's approval apparently on the strength of its promise to keep the interurban railway in operation by subsidizing it from power and light profits. No doubt this offer gladdened the hearts of Franklin citizens who had good cause to fear for the fate of their transportation service.

The Commission, however, refused to approve of this part of the new company's franchise. It held that while the city had the right to enfranchise whatever corporation it chose, it could not make the franchise contingent upon operation of the interurban railway. This leaves the case on the Commission's docket pending settlement of the railway controversy between the city and the new company. Whether the city council will regret its award to the new company now that subsidization of its traction system from power and light profits is impossible remains to be seen. In any event the Southern Cities Power Company is in a difficult position and its investment is in grave danger.

❦

Basis for Return Is Figured Differently From Its Amount

IN our last issue we discussed some recent statements and holdings respecting the rates for metropolitan as compared with rural telephone service. It now appears that the allocation of local exchange values continues to be a bone of contention in the computation of telephone rates. Take the city of Shreveport, Louisiana, for instance—a city of 60,000 people.

In a recent application by the Southern Bell Telephone & Telegraph Company for increased rates in Shreveport, that city contended that inasmuch as the Shreveport plant is but one unit of a state-wide system, no readjustment of the Shreveport situation should be made until a proceeding having for its purpose an inquiry into the earnings of the business in the state as a whole can be made. In answering this contention, the Louisiana Commission stated:

> "If the rate of return on the company's operations within the state as a whole were excessive or beyond a reasonable figure, it might be proper to give some consideration to the contention of the city in this respect. Even then, however, it would be the better practice to survey the rates of the state as a whole and make such adjustments in individual instances as might be warranted as proper. No such situation is presented, however, for the rate of return for the state as a whole for the year 1928 was less than 7 per cent. Obviously, therefore, any rate adjustment under which the Shreveport operations contribute less than 4 per cent to the earnings for the state as a whole, where such state-wide earnings are less than 7 per cent, is unduly preferential of Shreveport and discriminatory against subscribers to other exchanges in the state who are thus required, in substance, to make good the Shreveport deficit.
>
> "The authorities appear to hold that in situations such as this, where the earnings within the state as a whole are not excessive, and where the contribution of a given unit of a state-wide system is materially less than the average of the remaining units, the case should be disposed of on the basis of the rate of return contributed by the unit forming the subject matter of the inquiry."

This would seem to indicate that state-wide rate adjustments are in order where the evidence as to any particular location shows a sufficient inequality to warrant a general revision. This is to determine the relation of the company's earnings from the state

system as a whole to the earnings of its component units.

On the other hand, when it comes to determining what rate of return is reasonable, the local rather than the state-wide yard stick should be applied to the earnings from each unit according to the Louisiana Commission in the same proceeding. The opinion of Commissioner Fields on this point follows:

> "Numerous bankers and business men of Shreveport were called as witnesses as to what invested money should fairly earn in Shreveport. The preponderance of this testimony is to the effect that a return of less than 7 per cent is unduly low; and some of them regard 8 per cent as entirely reasonable. These opinions relate to an investment in Shreveport of approximately the same as that of the telephone company's investment there. On this line of testimony the city held that the investment in Shreveport should not be the yardstick by which to measure the reasonableness of the return, but that rather the investment in the state as a whole, or of the company as a whole in the nine southern states in which it operates should be the basis used. These witnesses concurred in the view of the city that if the return were to be figured on the investment in the state of Louisiana, approximately $50,000,000, or of the company as a whole in the territory in which it operates, approximately $228,000,000, then a smaller rate of return would be proper. We have found, however, that the Shreveport situation should be considered on its own merits; and, consequently, we shall disregard any testimony in this respect where the investment statewide or system-wide is used as a basis for calculating return."

Re Southern Bell Teleph. & Teleg. Co. Nos. 1133, 1138.

A Utility Cannot Restrain a Rival from "Stealing" Customers

Two or three years ago the rural sections of our great country used to resound to the erratic explosions of gasoline engines of home generating plants. With the recent rapid advance of rural electrification by utility companies, the manufacturers of such equipment have been shrewd enough to recognize the limitations of the one-cylinder electric plant business and to have gone in for building bigger and better units. The logical angle of approach, of course, would be a municipality showing signs of going into the electric utility business.

An unusual situation in this respect developed in the state of Texas and received the attention of the United States circuit court of appeals for that circuit. In this controversy an electric company attacked the attempts of a manufacturer of generating plants to induce a city, which it was serving, to go into a rival electric business.

It appears that the company had a franchise which was not exclusive to furnish and distribute electric current in Commerce, Texas. It also had a contract with the city of Commerce to supply it with current for the purpose of operating its waterworks and street lighting system.

Then appeared upon the scene the agents of a company manufacturing generating plants and (according to the allegations of the utility) they persuaded the city to enter into a con-

tract permitting it to install a generating plant and distribution system costing $104,000. The contract bound the manufacturer to accept payment out of the net revenue to be derived by the city for six years from the sale of its current. This probably caused the manufacturer to figure that it would be paid quicker if the Commerce plant were a success from the start. In any event, agents of the manufacturers assisted the city in soliciting and securing contracts from the citizens of Commerce to patronize the municipal plant when erected. Most of these citizens were at the time customers of the utility.

The utility then asked for and obtained an injunction in a Federal district court restraining the manufacturing company from in any way interfering with the utility in the performance of its contracts to supply service to the city and its citizens and from inducing its customers to make contracts with the city service. In reversing and setting aside the injunction, Circuit Judge Foster said:

> "It is not shown that any of the commercial contracts had terminated, but as they are for terms of only a year it is reasonable to suppose that as to all, or nearly all, of them the time would have arrived when it was optional for either party to cancel them on thirty days' notice before the municipal plant could be put in operation. As to the domestic contracts it is evident the contracts could be canceled at any time on giving the thirty days' notice provided for. There could be no doubt that the defendant would be within its legal rights in soliciting these customers to enter into contracts with the city on the lawful termination of their contracts with plaintiff.
>
> "We conclude that, so far as the record before us discloses, defendant was acting legally and within its rights in entering into a contract with the city of Commerce for the erection of an electric power plant and distribution system and then soliciting private parties to become customers of that plant when their contracts with the plaintiff were lawfully terminated."

The result of this decision is a finding, of course, that the manufacturing company was not trying to entice the customers of the utility to break their contracts but merely soliciting their business at such a time as their existing contracts would terminate. If the facts had been otherwise, an interesting point would have to have been decided—namely—the right of a utility to insist that everybody else keep "hands off" its customers. So far as we can ascertain, this exact point has never been settled. It has long been the law that a master can sue, for the loss of his servant, one who enticed the servant away from the master. Likewise in contracts, a theatrical manager has been permitted to sue a rival producer for damages resulting from the action of the latter in inducing an operatic star to break her contract with the former. But whether on these facts a utility, in the preservation of its duty to continue to serve, can obtain an injunction against parties attempting to spirit away its customers, seems a novel proposition.

Fairbanks, Morse & Co. *v.* Texas Power & Light Co. No. 5516.

A Municipality Can Acquire One Branch of a Joint Utility

THERE is nothing in law to prevent a utility from engaging in more than one kind of public service or, for that matter, in nonutility business over and above its utility service. But where a company has assumed the responsibility of performing two or more distinct forms of public service, difficulties may arise upon acquisition of one of them by a municipality. This can be a very important question because a joint utility company sometimes carries on an unprofitable service for years because of the fact that it is making a fair profit from another service. Where this is the situation a municipality may take the goose that lays the golden eggs and leave the goose eggs in red ink on the utility's books.

Back in 1926, the borough of Tyrone filed a petition with the Pennsylvania Commission for authority to take over the waterworks of the Tyrone Gas & Water Company. The company asked the court of common pleas of Blair county for an injunction to restrain the proceedings. The company contended that its gas works and water works were indivisible and not severable and that the borough did not have any lawful right to dispossess the company of its waterworks without including in the divestiture the gas works. It was also pointed out by the company that the waterworks were profitable and the gas works were unprofitable.

The court refused to grant the relief sought and held that the law considered the company as two distinct services and it was, therefore, its duty to keep its accounts and plants so separate as to admit of acquisition of either service by the municipality. The opinion states:

> "It is contended on the part of the plaintiff company that the defendant borough has the right, under clause 7 of said Incorporation Act, which said company has already accepted, to take the waterworks provided it also takes the gas-plant. And that it would be unjust and inequitable to permit the said borough to take over the water-plant without taking the gas-plant, for the reason that the water-plant is profitable to the said plaintiff company and that the gas-works has never been operated at a profit. This contention fails, for the reason that under the clearly expressed language of the act the borough had the right and option, after a period of twenty years, to take over either the gas or the water, without the other, whether either or both had been operated at a loss or with profit. In fact, whether the gas or water-plant is profitable has no bearing on the rights of the municipality under said act. Prior to the Constitution of 1874, corporations were authorized by special acts of assembly with omnibus purposes and powers. Corporations existed for the furnishing of gas, street railway service, electric light and power, and other public utility service, and it could not be successfully contended that a municipality could not take over the gas-plant or water-plant of such a corporation under said clause 7 without also taking over all and every other interest of said corporation and after said corporation had accepted the provisions of the Act of 1874. This section of the act specifically enables a municipality to take over either 'water or gas' at any time after twenty years from the introduction of the same. And, in our opinion, it matters not in what manner said gas or water company is being operated.

Whether or not the management of the two plants is in one person or in one group of persons, or in the same office, or the accounts kept in the same books, or that the laborers be the same in both operations. Both plants might be run in connection with many other service plants, but certainly the manner of their operation cannot be used to defeat the purposes of the act of assembly under which said plants exist."

Tyrone Gas & Water Co. *v.* Tyrone, No. 1095.

❦

A California Company Is Awarded Exclusive Natural Gas Privileges

THE old maxim, "competition is the life of trade," seems to be taking a bad beating in these days of colossal combines and chain mergers. Whatever may be said of the value of competition as a regulator of charges in other lines of business, it proved to be a failure in the public utility industry. It was a long time before this was understood, and even now it is not generally appreciated by the public.

Now it appears that the elimination of competition is spreading to other business. Mass production is the modern keynote of manufacturing efficiency and this means the elimination of duplicate facilities by numerous rivals. Merchants in a great many lines are finding it cheaper for themselves and for the public to consolidate their efforts and share the economies with the customers. Mergers that twenty years ago would have aroused criticism from the press and legal opposition from the Department of Justice, are today calmly approved and even encouraged by Government Departments.

But there still persists, even in utility circles, very eminent authority for the proposition that a little competition is a good thing to check monopolistic grants, notwithstanding the superior regulatory powers of the Commissions over their rates and service.

An indication of this sentiment was shown by the virgorous dissent of two of the California Commissioners against a majority of three in denying a permit to the Western National Gas Company to build and operate a pipe line from the San Joaquin Valley fields to Contra Costa county. This action came immediately after a unanimous decision of the Commission awarding to the Pacific Gas & Electric Company authority to build such a line and had the effect of granting a virtual monopoly to the latter utility.

Commissioner Carr, in dissenting, was of the opinion that the bringing of a natural resource like gas from a distant field where produced to the place of use should not be monopolized in the absence of plain and convincing evidence that the public will be better served by a single industry. Commissioner Carr was of the opinion that the record did not contain such evidence. He further pointed out that an additional pipeline from the field to the location would give added assurance of permanency of the supply of natural gas and that the single line would have elements of risk which would be obviated where a second line would be available.

The majority of the Commission,

however, found that the Pacific Gas & Electric Company is now serving 95 per cent of the territory and has contracted for enough gas to serve the district for years to come, and that it was, therefore, entitled to an opportunity to develop an "industrial outlet" for the gas as well as a household and domestic load.

It had been the contention of the Western National Gas Company that it did not propose to sell in competition with the Pacific Gas & Electric Company in the industrial territory which the latter corporation now serves, and that it was otherwise concerned only with industrial business, and was therefore, not competitive.

❦

Permission to Abandon Utility Service Cannot Be Denied to a Dead Corporation

A CORPORATION is rather an elusive thing when one stops to consider it philosophically. An "artificial person created by law and existing only in contemplation thereof,"—the corporation is simply a juristic person—an abstract conception, with neither physical shape nor autonomic force. In order to work out commercial problems conveniently and justly, the law is willing to call into theoretical existence something which has no existence in fact,—to attribute to a group of mortal and human individuals a collective personality at once immortal and purely juristic.

But all corporations are not immortal. Persons incorporating a business may, if they choose, incorporate for a limited term of years. At the end of that time the corporation dies—it automatically dissolves into a nonentity and the directors are directors no longer but become temporary trustees of the assets of the dead corporation for the purpose of distributing them to the erstwhile stockholders, subject, of course, to the payment of the debts of the defunct concern.

A rather remarkable situation involving a dead corporation recently came before the Montana Commission. It appeared that on October 6, 1905, the Miles City & Ekalaka Telephone Company was incorporated for a term of twenty years to operate a telephone business. Consequently, on October 6, 1925, the company died a natural death. Nothwithstanding this fact the affairs of the dead corporation were permitted to drift on under the management of the erstwhile secretary-treasurer of the utility for nearly four years. During that time the former directors took no steps to wind up or liquidate its assets.

The Commission decided that it could not refuse permission to such a concern to abandon service upon application of the former directors. It said:

> "Upon dissolution, accomplished in either of the methods prescribed by the statute (6010), a corporation is essentially dead, except for the general purpose of collecting its assets, paying its debts, and dividing its property and money remaining after the satisfaction of its liabilities among its stockholders."

Re Miles City-Powder River District Teleph. Service, Docket No. 1034, Report & Order No. 1549.

WHAT IS A RIGHT TO

When the Laws of Search and Seizure Protect—and Jeopardize—a Public Utility's Files

By ELLSWORTH NICHOLS

TEN years before the American patriots signed the Declaration of Independence, Lord Chatham, in the British Parliament, declaimed:

> "Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement."

That statement expresses the attitude of Englishmen and Americans towards their governments, and the legislators and courts have upheld the principle to a large extent.

REVOLT against governmental intrusion into a man's home and possessions, except for cause, found its fruition in the Fourth Amendment of the Federal Constitution, which declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Similar clauses are found in the Constitutions or statutes of the states.

The meaning of this prohibition and its proper application have been the subject of many judicial decisions; the rights of citizens in criminal cases have been defined; the prohibition has been explained in its relation to searches and seizures of vehicles carrying prohibited intoxicating liquors; it has been invoked to protect owners against seizures of private papers and records.

Here we are interested in the question:

To what extent can a Commission, or other inquisitorial or regulatory body, go in seizing, inspecting, and subpoenaing the records, books of account, and papers of public utilities or other corporations?

Let us first get a background of general principles.

THE question of constitutional immunity from unlawful search and seizure may arise in various ways. One of the most common situations is where officers search and seize property without a warrant. Another is where a warrant is used

CORPORATION'S PRIVACY?

"If a State Public Service Commission or any other kind of a commission comes to your door or mine and commands us to show our books or papers, must we comply?"

but the right to issue the warrant is contested.

In the case of documents and papers the question is sometimes brought up when a subpoena duces tecum is issued. This is a mandate directed to individuals or corporations requiring them, under penalty, to bring before a legal tribunal—a court, grand jury, commission, or other investigating body — certain specified papers, books, or records.

Objections to the production of corporate papers under compulsion are based usually upon the ground that the Fourth and Fifth Amendments of the Federal Constitution protect persons from such an invasion of privacy and from the furnishing of self-incriminating evidence. These two amendments have sometimes been viewed as correlative and operating together,[1] but they are distinct and aim at different evils.[2]

The Fifth Amendment protects against self-incrimination under the whip of judicial process; the Fourth Amendment protects privacy. Of course, it may be true that after one's privacy is invaded, papers found may be introduced in evidence against one; but in such an event there would be two distinct constitutional violations, and the violation of the Fifth Amendment does not necessarily follow in the wake of a violation of the Search and Seizure Amendment.

THE Federal statutes provide that search warrants may issue:

First, for stolen or embezzled property;

Second, for property used in the commission of a felony;

Third, for property used in violation of penal statutes. Such a warrant may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and the law provides that it may be taken.[3]

THE construction of the Fourth Amendment to the Federal Constitution was exhaustively considered in a case based on a claim that certain cases of plate glass had been im-

[1] Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

[2] Hale *v.* Henkel, 201 U. S. 46, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

[3] Gouled *v.* United States, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

ported in fraud of the revenue laws. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported, and the district judge directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. The Supreme Court held that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be, and that the order in question was an unreasonable search and seizure within that amendment.

THE history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was reviewed and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime is illegal—that it compels him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and of an unreasonable search and seizure—within the meaning of the Fourth Amendment.[4]

The place held most sacred from search and seizure is the home. Motor vehicles are not protected to the same extent, although they are not outside the pale of the Fourth Amendment to the Constitution.[5]

So, too, in regard to corporations, it has been said that corporations do not enjoy the same immunity that individuals have, under the Fourth and Fifth Amendments, from being compelled by due and lawful process to produce books, records, and papers of the corporations for examination by the state or Federal Government.[6]

Mr. Justice Harlan, in a separate opinion in one case, rejected the idea that a corporation had the right to invoke the Fourth Amendment. He stated:

> "In my opinion, a corporation—'an artificial being, invisible, intangible, and existing only in contemplation of law'—cannot claim the immunity given by the Fourth Amendment; for, it is not a part of the 'people,' within the meaning of that Amendment. Nor is it embraced by the word 'persons' in the Amendment."[7]

MR. Justice Brewer, in a dissenting opinion in the same case, argued that there was no reason for excluding corporations from the protection of the Fourth Amendment. He pointed out that corporations had been considered "persons" within the meaning of the Fourteenth Amendment and he could find no distinction so far as the Fourth or Fifth Amendments were concerned.

The majority opinion has been that while corporations cannot avail themselves fully of the protection of the Fourth Amendment of the Federal Constitution, they are not subject to unreasonable searches and seizures

[4] Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

[5] Carroll *v.* United States, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280.

[6] Essgee Co. *v.* United States, 262 U. S. 151, 67 L. ed. 917, 43 Sup. Ct. Rep. 514.

[7] Hale *v.* Henkel, 201 U. S. 43, 78, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, 380.

but are, as pointed out by Chief Justice Taft, only required to produce records against themselves by the demand of the Government expressed in lawful process, hedging its requirements within limits which reason imposes in the circumstances of the case. The corporation is to submit its books and papers only to "duly constituted authority when demand is suitably made." [8]

In one case it was said:

> "The corporate form of business activity, with its charter privileges, raises a distinction when the authority of Government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the state, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress." [9]

A ruthless ransacking of a corporation's offices to find evidence of crime is not tolerated.[10] But the search and seizure clause was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production upon a trial in court of documentary evidence.[11]

THERE has been some question tion whether the search and seizure clause applies in civil as well as criminal cases, and the opinion is that it applies only in criminal cases, or investigations which may be preliminary to criminal proceedings, or proceedings which are penal in character.[12]

An Act of Congress authorizing compulsory process for the production of the books and papers of a claimant or defendant in any proceeding other than criminal, arising under the Revenue Laws, is not obnoxious to the search and seizure clause.[13]

When information contained in books and papers is material to the vindication of a person's rights in

[8] Essgee Co. *v.* United States, 262 U. S. 151, 67 L. ed. 917, 43 Sup. Ct. Rep. 514.

[9] Wilson *v.* United States, 221 U. S. 361, 382, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, 545, Ann. Cas. 1912D, 558.

[10] Silverthorne Lumber Co. *v.* United States, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182.

[11] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; American Lithographic Co. *v.* Werckmeister, 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. Rep. 676; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178; Potter *v.* Beal, 49 Fed. 793; Ex Parte Fuller, 262 U. S. 91, 67 L. ed. 881, 43 Sup. Ct. Rep. 496; Essgee Co. *v.* United States, 262 U. S. 151, 67 L. ed. 917, 43 Sup. Ct. Rep. 514; Dier *v.* Banton, 262 U. S. 147, 67 L. ed. 915, 43 Sup. Ct. Rep. 533; State *v.* Standard Oil Co. 218 Mo. 1, 116 S. W. 902, affirmed in 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936.

[12] *Re* Strouse (D. C. Nev. 1871) 1 Sawy. (U. S.) 605, 23 Fed. Cas. No. 13,548. See also Murray *v.* Hoboken Land & Improv. Co. (N. J. 1855) 18 How. 272, 15 L. ed. 372.

[13] United States *v.* Three Tons of Coal, 6 Biss. (U. S.) 379, 28 Fed. Cas. No. 16,515. See also *Re* Platt, 7 Ben. (U. S.) 261, 19 Fed. Cas. No. 11,212; Stockwell *v.* United States, 3 Cliff. (U. S.) 284, 23 Fed. Cas. No. 13,466, affirmed 13 Wall. 531, 20 L. ed. 491.

court, the person in whose custody these records are, can be compelled by judicial process to appear and give evidence.[14]

A witness who is not a party may be compelled to produce a document material to the issue, though it may subject him to a civil suit.[15]

A tradesman may be compelled to produce his books, though they contain admissions against himself.[16]

A postmaster cannot refuse to produce in court, in answer to a subpoena, the records of his office, containing the names of renters of post-office boxes, on the ground that post-office department regulations forbid.[17]

WHEN, in civil cases, the use of a court mandate to require the production of papers is sanctioned, the objection is frequently raised that private papers, which should for particular reasons be kept from the public eye, ought not to be ordered into court. This objection has not met with success, although the courts attempt to limit public scrutiny and protect the owner against misuse of the evidence.

The rule has been announced that a corporation is not relieved from producing books, when they contain matters material to an issue, merely because they are private.[18]

No organization, or the members thereof, can withhold the evidence of contracts made by it or them with other persons or the public, on the ground that it is a secret order, and that the production of the books which contain the evidence will expose its secrets; nor can such organization or persons determine the legal effect of its resolutions pertaining to the matter of the contract.[19]

So, in a suit for infringement of a patent, in which the defense is lack of novelty, an officer of a corporation, not a party to the suit, may be compelled to produce drawings tending to show that the patented article was in use before the patent was obtained, though the corporation objects that thereby valuable business secrets regarding its methods of manufacture, obtained at great labor and expense, will be disclosed, causing it great loss.[20]

A PARTY to a suit, it has been ruled, cannot refuse to produce private letters from a stranger, though marked "private and confidential," and though the writer refuses to consent to their production; but the party seeking their production may be compelled to give an undertaking not to use them for any collateral object.[21]

It has been held that a plaintiff who obtains information from the production of documents in the defendant's

[14] First National Bank *v.* Hughes, 6 Fed. 737; Johnson Steel Street-Rail Co. *v.* North Branch Steel Co. 48 Fed. 191; Bloede Co. *v.* Joseph Bancroft & Sons Co. 98 Fed. 175, found in 45 C. C. A. 354, 106 Fed. 396, 52 L.R.A. 734; Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; United States *v.* Terminal R. Asso. 148 Fed. 486; *Re* Dunn, 9 Mo. App. 255; Elder *v.* Bogardus, 1 Edm. Sel. Cas. 110; Boston & M. R. Co. *v.* State, 75 N. H. 513, 77 Atl. 996.

[15] Doe ex dem. Egremont *v.* Date, 3 Q. B. 609; Bull *v.* Loveland, 10 Pick. (Mass.) 9; Boston & M. R. Co. *v.* State, 75 N. H. 513, 77 Atl. 996.

[16] Holtz *v.* Schmidt, 2 Jones & S. 34 N. Y. Super. Ct. 28.

[17] Rice *v.* Rice (N. J. Eq.) 25 Atl. 321.

[18] *Re* Bolster, 59 Wash. 655, 110 Pac. 547, 29 L.R.A.(N.S.) 716.

[19] National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101.

[20] Johnson Steel Street-Rail Co. *v.* North Branch Steel Co. 48 Fed. 191.

[21] Hopkinson *v.* Burghley, L. R. 2 Ch. 447.

The Constitutional Safeguards to Privacy

"A SUBPOENA duces tecum is a mandate directed to individuals or corporations requiring them, under penalty, to bring before a legal tribunal—a court, grand jury, commission, or other investigating body—certain specified papers, books, or records. Objections to the production of corporate papers under compulsion are based usually upon the ground that the Fourth and Fifth Amendments of the Federal Constitution protect persons from such an invasion of privacy."

possession is not at liberty to make it public, and that an injunction, if necessary, will be granted to restrain. As the facts in that case showed that there was danger to the defendant's business from the publication of the contents of documents sought, an order for their production for inspection by plaintiff was made conditional upon the plaintiff's undertaking not to make public, or communicate to any stranger to the suit, the contents of such documents, and not to make them public in any way.[22]

Thus it seems that the mere desire for privacy is not a good excuse for not producing documents needed in legal proceedings. There must, however, be reasonable grounds for requiring their production, as will be shown in our discussion of the general question of the reasonableness of demands for books and papers.

WHATEVER right of protection under the Fourth and Fifth Amendments of the Constitution a person may have, we cannot lose sight of the fact that the right to invoke the protection of these constitutional provisions is personal and cannot be used in behalf of a third party. The Fourth Amendment, for example, protects parties to a criminal prosecution and does not authorize third persons who have books and papers which may be relevant to the inquiry to refuse to produce them.[23]

Likewise, constitutional rights of corporate stockholders do not extend to books and papers of the corporation in their possession relative to illegal search and seizure and admission thereof against them.[24]

The president of a corporation has been held in contempt of court for refusal to produce copies of corporate correspondence for a grand jury, pursuant to a subpoena duces tecum addressed to the corporation.[25]

In the same way that an officer of a corporation cannot invoke the constitutional protection in favor of the

[22] Williams *v.* Prince of Wales Life Insurance Co. 23 Beav. 338.

[23] United States *v.* Mobile First National Bank, 295 Fed. 142, affirmed in 267 U. S. 576, 69 L. ed. 796, 45 Sup. Ct. Rep. 231.

[24] Bilodeau *v.* United States, 14 F. (2d) 582. Certiorari denied in 273 U. S. 737, 71 L. ed. 866, 47 Sup. Ct. Rep. 245.

[25] Wilson *v.* United States, 221 U. S. 361, 382, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558.

corporation when he is ordered to produce books or records in his possession, a corporation, it has been held, is not privileged to refuse the production of its books and records even though they may tend to incriminate an officer thereof.[26]

THE right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It has been pointed out that it was never intended to permit him to plead the fact that some third person might be incriminated by his testimony even though he were the agent of such person. In the United States Supreme Court it has been said in this regard:

> "A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a 'person' within the meaning of this Amendment really does not arise, except, perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti-trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole Act of Congress." [27]

MUCH of the difficulty in connection with the search and seizure clauses, so far as corporation records and papers are involved, has arisen in proceedings by the Federal Government and its agencies. We can dispose of the matter so far as the states are concerned with little trouble, by pointing out the fact that corporations created by a state are subject to their creator and must submit to its supervision and regulation.

As stated in a case before the United States Supreme Court, the corporation as a creature of the state is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and to limitations of its charter. Its powers are limited by law. It can make no contracts not authorized by its charter. Its right to act as a corporation is only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises have been employed, and whether they have been abused, and demand the production of the corporate books and papers for that purpose.[28]

It was intimated in another Su-

[26] Linn *v.* United States, 163 C. C. A. 470, 251 Fed. 476.

[27] Hale *v.* Henkel, 201 U. S. 43, 70, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, 377.

[28] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, 379.

preme Court opinion that a state may have powers over papers of a corporation, domiciled in its territory, beyond the powers of a Federal Commission. It was said, in passing upon the powers of the Federal Trade Commission:

> "The question is a different one where the state granting the charter gives its Commission power to inspect." [29]

PURSUANT to the powers of the states, corporations are required to keep stock books, account books, and records generally, and the states require corporate reports. What is true of corporations generally must be true of public utility corporations, and in the case of these corporations there are further obligations and duties arising from their peculiar status. Regular inspection of public utility records is accepted as a matter of course.

The Public Utilities Commissions are empowered by statute to supervise and regulate the operations of public service corporations. They must oversee the service, the rates, and the securities in most states. In order to do this they must have knowledge of the operations of the companies. To this end they have established uniform classifications of accounts which the companies are compelled to follow, and periodical reports based upon these accounting systems must be made to the Commissions.

So far as steam railroad companies are concerned, there has been cooperation between the Interstate Commerce Commission and the various State Commissions, through the National Association of Railway Commissioners, which has resulted in the establishment of a standard form of annual reports which is used by nearly all of the Commissions. Many states also use the Interstate Commerce Commission form of report for electric railways and telephone companies.

These reports require information regarding corporate organization and history, intercorporate relationships, assets and liabilities, income accounts, description of property, operating statistics, and other information.

EVEN as a state which has created a corporation may investigate it, so, to some extent, may the Federal Government.

It was declared by the Supreme Court of the United States, in the case of a corporation chartered under the laws of New Jersey, that the franchises received from the state, so far as they involved questions of interstate commerce, must be exercised in subordination to the power of Congress to regulate such commerce, and in that respect the Government might also assert a sovereign authority to

[29] Federal Trade Commission *v.* American Tobacco Co. 264 U. S. 298, 68 L. ed. 696, 44 Sup. Ct. Rep. 336, 32 A.L.R. 786.

¶ The fact must always be recognized that investigations cannot go into fields not opened up by the law creating the investigating Commission.

ascertain whether such franchises had been exercised in a lawful manner with a due regard to its own laws. The Court continued:

> "Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over the state corporation."[30]

In many fields public officials exercise a supervisory power over citizens, especially in those types of business which are subject to licensing statutes. Inspection of books and records accompanies such supervision.

A few examples will serve to illustrate.

STATUTES providing that the proper officers shall have access to all the records of public offices, and the books and papers of corporations and taxpayers for the purpose of assessing the property for taxation, do not violate the provision of the Constitution securing to the people the right against unreasonable search and seizuse.[31]

No one had a right in the days of governmental regulation of the liquor traffic to engage in the business except with the consent of the Government. Consent was obtained on terms and conditions. Books and entries of a distiller were quasi-public records and the Government had the right to require their production in all suits and proceedings other than criminal, without violating the Fourth Amendment.[32]

The Lever Act, which provided for licensing dealers in foods, feeds, fuels, etc., and for regulations requiring keeping of accounts and the inspection of business and records, was held not to violate Constitutional Amendments Four and Five, forbidding unreasonable searches and seizures and the compelling of one to be a witness against himself. The books and papers which the dealer was compelled to keep as a condition of doing business during the War were not private papers within the meaning of the Constitution, but records of a quasi-public nature, the keeping of which was a condition of his doing business, by the acceptance of which he might be deemed to have waived the constitutional rights which he would otherwise have.[33]

A congressional act, authorizing supervision of Internal Revenue, to compel banks to permit inspection of their books and papers connected with a public business is constitutional.[34]

An ordinance under a statutory power to regulate and license chattel mortgage and salary loan brokers, requiring every person engaged in such business to file weekly with the auditor of the city, a detailed record of every loan made during the week preceding, to remain there as a perma-

[30] Hale *v.* Henkel, 201 U. S. 43, 75, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

[31] Washington Nat. Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53.

[32] United States Distillery No. 28 (D. C. Wis.) 6 Biss. (U. S.) 438, 25 Fed. Cas. No. 14,966.

[33] United States *v.* Mulligan, 268 Fed. 893.

[34] Stanwood *v.* Green, 2 Abb. (U. S.) 184, 22 Fed. Cas. No. 13,301.

nent record open to the inspection of the mayor and chief of police, it has been held, is not violative of a statutory provision protecting "the right of the people to be secure in their persons, houses, papers, and possessions." [35]

An order of a municipal assembly made in the exercise of its charter of power requiring the production before it of books of a corporation in aid of an investigation as to the evasion of license taxes by corporations was not deemed a violation of the constitutional guaranty against search and seizure.[36]

The constitutional prohibition against unreasonable searches was not violated by a statute giving tax officials the right to examine books and papers of taxpayers for the purpose of properly listing assessable property for taxation.[37]

There are, of course, limitations. While a statute providing that books of cotton buyers should be open to public inspection was declared constitutional in South Carolina,[38] a city ordinance without special legislative authority, requiring merchants buying loose cotton to keep in a book, open to inspection, a daily record of purchases was held to be void in Tennessee.[39]

Then, too, a statute providing for the issuance of warrants by judges of insolvency on the complaint of the assignee, to search for property of the debtor, was declared unconstitutional as violating the rights of citizens to be secure from all unreasonable searches and seizures.[40]

And in New York it has been held that the power given the commissioners of accounts of New York city to issue a subpoena duces tecum did not repeal, by implication, § 8 of Civil Rights Law of New York, relative to search and seizure.[41]

WITH these general principles before us, we may conclude that the validity of an order requiring the production of a corporation's books and papers is largely a matter of reasonableness and the use of proper legal process. Then, too, when the requirement is made by a body such as a Commission or investigating committee, it is necessary to determine what powers have actually been delegated to that body.

For an understanding of the extent to which the Federal Trade Commission may go in its investigations, it is necessary to determine the purpose of the law that created the Commission. Section 5 of the Federal Trade Commission Act shows that its purpose is to make unfair methods of competition in commerce unlawful, and the Commission is empowered and directed to prevent persons, partnerships, or corporations (other than certain corporations subject to other Commissions, as in the case of railroads) from using unfair methods of competition in commerce.

In one case the resolution of the

[35] Sanning *v.* Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686.

[36] *Re* Conrades, 112 Mo. App. 21, 85 S. W. 150.

[37] Co-operative Building & Loan Asso. *v.* State ex rel. Daniels, 156 Ind. 463, 60 N. E. 146.

[38] Park *v.* Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234.

[39] Turner *v.* Nashville, 19 Gates, 509.

[40] Robinson *v.* Richardson, 13 Gray (79 Mass.) 454.

[41] *Re* Foster, 139 App. Div. 769, 124 N. Y. Supp. 667.

The Corporation Is a Creature of the Legislature and Subject to Its Scrutiny

"THE corporation, as a creature of the state, is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and to limitations of its charter. Its powers are limited by law. It can make no contracts not authorized by its charter. Its right to act as a corporation is only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers."

Senate provided that "the Federal Trade Commission be and is hereby directed to investigate the tobacco situation in the United States as to the domestic and export trade with particular reference to the market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation."

This resolution was held not to have the mandatory effect of statutory enactment with reference to the Commerce Clause of the Constitution. The resolution of the Senate did not come within the terms of the authority conferred by a statute authorizing compulsory production of papers. Under § 6, power was conferred upon the Commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the Anti-trust Acts by any corporation," but the language of this statute made it necessary for one of the Houses of Congress to adopt a resolution for a direction to investigate, and reporting such investigation must be for alleged violations of the Anti-trust Acts.

THE resolution of the Senate, it was said, failed to indicate that it was founded upon any violation or alleged violation of the Anti-trust Law. It did not indicate that the Senate intended that any Anti-trust Law violation should be investigated by the Commission. If so, an apt expression to that effect could have been used. It could not, therefore, be concluded that it was intended in the language used, to investigate any violations of the Anti-trust Acts by any corporation. In any case, the power of the Federal Trade Commission could not be broader than what Congress did or could delegate.[42]

The United States Supreme Court has explained the powers conferred upon the Interstate Commerce Commission in so far as they affect the examination of a corporation's pa-

[42] Federal Trade Commission *v.* P. Lorillard Co. (U. S. Dist. Ct. S. D. N. Y.) 283 Fed. 999.

pers. Congress has authorized the Commission to prescribe the forms of accounts, records, and memoranda of railroads. The Commission is empowered to appoint agents or examiners with authority to inspect and examine such accounts, records, and memoranda. The court has held, however, that there is nothing in the provisions of the law to suggest that correspondence relative to the railroad's business may be examined in this way. The primary object to be accomplished by the legislation was to establish a uniform system of accounting and bookkeeping and to have an inspection thereof. If it were intended to permit the Commission to authorize examiners to seize and examine all correspondence of every nature, the court has pointed out, Congress would have used language adequate to that purpose.[43]

Justice Holmes, of the Supreme Court, has said that the purposes of the Interstate Commerce Act for which the Commission may exact evidence embrace only complaints for violation of the Act and investigations by the Commission upon matters that might have been made the object of complaint; that the main purpose of the Act was to regulate the interstate commerce business of carriers, and the secondary purpose (that for which the Commission was established) was to enforce the regulations enacted; and that the power to require testimony is, therefore, limited, as it usually is in English-speaking countries, at least, to cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.[44]

So, with any investigating commission, we can safely conclude that in addition to fundamental rules governing search and seizure, the fact must always be recognized that investigations cannot go into fields not opened up by the law creating the investigating commission.

WHILE there is no absolute prohibition against search and seizure, search and seizure must be reasonable and according to law. An officer cannot, except in certain emergencies enter a man's home and make a search; he may, however, enter and search under the authority of a valid search warrant. A search warrant cannot be issued on mere suspicion; it can, however, be issued upon a showing of probable cause. A search even under a warrant must be carried out with moderation and judgment, and its reasonableness is gauged largely by time, manner, and extent. Similarly, a mandate calling for the production of papers is circumscribed by the rule that it must describe certain documentary evidence and not call for all documents which may possibly reveal evidence.

Before compelling the production of private books and papers by a subpoena duces tecum, the court will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue the writ.[45] It has been decided that the

[43] United States ex rel. McReynolds *v.* Louisville & N. R. Co. 236 U. S. 318, 59 L. ed. 598, P.U.R.1915B, 247, 35 Sup. Ct. Rep. 363.

[44] Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115.

[45] Dancel *v.* Goodyear Shoe Machinery Co. 128 Fed. 753.

court should not compel the officers of a private corporation to allow a party to inspect its corporate records and documents, when the latter desires merely to gratify an idle curiosity by prying into its affairs.[46]

IN an *ex parte* action by a county to re-establish lost records, it has been held, an abstracter cannot be compelled by a subpoena duces tecum to produce his abstract books, the financial value of which consists largely in their privacy and secrecy, where the pleadings do not allege or set out anything whatever as the specific contents to be proved, except generally the contents of a deed book of a certain number covering a certain period of time. The court said:

> "Most certainly there was no warrant in the prior law for using it as a means to compel discovery of the contents of books or documents, with a view to establish copies of them to stand in lieu of the originals. It could be used to bring in evidence to show that an alleged copy was a true copy; that is, it could be used to obtain evidence, as contradistinguished from discovery. To verify what is alleged is a legitimate use of the subpoena, but without anything for verification being alleged, to employ it for ascertaining what is to be verified, and at the same time for verifying the matter thus discovered, is giving it a double operation, the first half of which is illegitimate. The difference is that between making a statement and then fishing with the subpoena for proof of it, and fishing in silence for proof, treating the proof itself as supplying the statement to be established." [47]

A party has no right, and a court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case.[48] No official can be given authority to rummage through the papers of an individual without the latter's consent, in the hope that something or other may be discovered useful for some public purpose.[49] Neither branch of the Congress, still less any merely administrative body established by it, possesses or can be invested with a general power of making inquiry into the private affairs of the citizen.[50] The right of access given by statute is to documentary evidence—not to all documents, but to such documents as are evidence.[51]

APPLYING the test of reasonableness to one case, the court concluded that a subpoena duces tecum was far too sweeping in its terms to be regarded as reasonable. It did not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between a certain company and no less

[46] Phoenix Iron Co. *v.* Commonwealth, 113 Pa. 563, 6 Atl. 75; Bloede Co. *v.* Joseph Bancroft & Sons Co. 98 Fed. 175.

[47] *Ex parte* Calhoun, 87 Ga. 359, 367, 13 S. E. 694.

[48] Dancel *v.* Goodyear Shoe Machinery Co. 128 Fed. 753; Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241; Bloede Co. *v.* Joseph Bancroft & Sons Co. 98 Fed. 175 (order for inspection before trial, affirmed in 45 C. C. A. 354, 106 Fed. 396, 52 L.R.A. 734, where this point was not involved); Elder *v.* Bogardus, 1 Edm. Sel. Cas. 110.

[49] Federal Trade Commission *v.* Baltimore Grain Co. (U. S. Dist. Ct.) 284 Fed. 886, affirmed in 267 U. S. 586, 69 L. ed. 800, 45 Sup. Ct. Rep. 461.

[50] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. Rep. 1125.

[51] Federal Trade Commission *v.* American Tobacco Co. 264 U. S. 298, 68 L. ed. 696, 44 Sup. Ct. Rep. 336, 32 A.L.R. 786.

than six other companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the former, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.[52]

A RECENT case involving the question of reasonableness of a requirement that certain books and papers be produced before a Federal Commission was decided by Judge Knox, of the United States District Court for the Southern District of New York, on July 18, 1929. He sustained objections to a subpoena requiring the production of books and papers by a company holding stock of electric utilities.

Judge Knox pointed out that Congress had not as yet undertaken to regulate the interstate carriers of electricity in the same way that interstate common carriers were supervised and controlled, and that the power of the Federal Trade Commission to investigate companies engaged in the electric business, or the holding corporations, was hardly comparable with that of the Interstate Commerce Commission with respect to interstate common carriers. It was ruled that until particular documents, including books, became evidentiary, the corporation is not obligated to lay before the Commission its books and papers for scrutiny in an investigation to ascertain whether the anti-trust laws have been violated. In the words of Judge Knox, the Commission cannot say to a suspected corporation, "stand and deliver the possible evidence of the crime of which you are suspected." [53]

FROM an examination of the authorities it appears that before a corporation can be required to produce its papers and records, they must be shown to have some materiality, in a proceeding which the investigating body has power to conduct.

Fishing expeditions to discover evidence are not sanctioned, but in the case of public service corporations there is more latitude than in the case of other corporations,—especially in noncriminal proceedings under the jurisdiction of a Commission charged with regulating the affairs of such enterprises within the state.

Whatever right of inspection there may be, it must be carried on through the use of legal process in a reasonable manner.

[52] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. See also Cudahy Packing Co. *v.* United States, 15 F. (2d) 133.

[53] Federal Trade Commission *v.* Smith (U. S. Dist. Ct.) July 18, 1929.

¶ "WE *can do no better than to urge upon Commissions, the closest co-operation between them, the utilities and the public, for after all, the duty of the Commission is best performed when it has secured reasonably friendly relations between the other two and has procured for the public service from the utility that is of a high standard.*"

—COMMITTEE ON PUBLIC UTILITY RATES.
NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS.

PUBLIC UTILITIES FORTNIGHTLY
MUNSEY BUILDING ✣ WASHINGTON, D. C.

October 31, 1929.

Dear Sir:

The other day we received a "clip sheet" from the Connecticut Committee on Public Service Information. This sheet is a utility publication.

Among other things, it was stated that engineers at the present time are at work upon a gas-fired apparatus which will be capable of heating the home during the winter months and of keeping it supplied during the summer with refreshing cooled air at any desired temperature. At the top of the article on this subject the following memorandum appeared.

"Source of information: Hartford Gas Company:"

Each article on the sheet contained a similar note stating the source of the information published. We understand that this complies with the highest standards of ethics applicable to publicity of this nature. If it is propaganda it is properly labeled. The reader can take it or leave it according to his faith in the source from which it comes.

We fear, however, that a legal requirement that the source of published information be stated in every case would be somewhat embarrassing at times to a number of persons who are now demanding it of the utilities.

The New Republic, for example, in its August 28th issue, contains an article entitled "Another Power Plot." It is based on what is said to be "a secret memorandum recently brought to light by the Baltimore Sun with information that it was prepared probably by someone in

the National Electric Light Association for circulation among the controlling spirits of the industry."

The authenticity of this memorandum has been denied by the National Electric Light Association but we are not concerned with the merits of this controversy. The New Republic concludes the article as follows:

> "If this memorandum is genuine, as there is strong external and internal evidence that it is, what more damaging exposure of the cynical attitude and dangerous activities of the industry under its present leadership could be imagined?"

The point we are trying to make is that this was an attack on the electrical industry based upon a memorandum the source of which was not given either by the Baltimore Sun or the New Republic. A statement that it was probably prepared by someone in a certain organization is not a true statement of its source. It does not measure up to the high ideal placed before the utilities.

The practice of setting up ethical standards for others is as common as bringing up other persons' children. It is, indeed, very hard to live up to those standards ourselves but that does not prevent us from insisting on their strict observance by others, especially by those whom we dislike.

In our opinion a pure publicity law requiring sources of information to be properly labeled, if made applicable to friend and foe alike, would prove very troublesome to many persons now shouting for it from the housetops.

Very truly yours,

Henry C. Spurr

HCS:S

The Challenge of the Massachusetts Commission

Massachusetts Attitude toward Security Issues and Prudent Investment

PART ONE

One of the most important recent developments in the field of public utility regulation has been the determination of the Massachusetts Commission that the Supreme Court ruling that utility companies are entitled to a fair return on the present value of their property shall not be allowed to supersede the Massachusetts ruling that the return shall be based on the investment. The Massachusetts controversy arose when a public utility company challenged the Massachusetts practice by an appeal to the courts. It has attracted wide attention. The historical development of the Massachusetts policy which is here ably presented by Dr. Barnes will, therefore, be of great interest at the present time.

BY IRSTON R. BARNES, PH.D.
DEPARTMENT OF ECONOMICS, SOCIOLOGY, AND GOVERNMENT, YALE UNIVERSITY

DURING the past two years the attention of those interested in the state regulation of public utilities has been concentrated upon developments in Massachusetts.

In the Worcester Electric Light rate case (decided June 3, 1927), the utility, for the first time in the history of the regulation of rates in Massachusetts, challenged the order of the Commission on the ground that the rates established were confiscatory, and appealed to the federal court.

Again the decision in the Cambridge Electric Light Company Case (January 31, 1928) was the occasion for a second appeal from the orders of the Massachusetts Commission.

All interested in the Massachusetts problem saw in these appeals a challenge of the right of the Commission to follow the so-called "Massachusetts rule," ignoring the controlling nature of the Supreme Court decisions.

The Commission responded to these appeals from its order by introducing into the legislature a bill designed to require the gas and electric companies to enter into contractual relations with the state, whereby the companies would agree to accept without appeal regulation by the Massachusetts Commission, so long as a company's earnings should remain sufficient to maintain the market value of the stock at or above par. The strenuous efforts of the Department of Public Utilities to avoid the necessity of complying with the Federal rule—that utilities be allowed to earn a return upon the present value of their property that is devoted to the public service—make appropriate a survey of the Massachusetts situation.

THE present status of regulation in Massachusetts can be understood only in the light of the historical development of the Massachusetts policy.

Massachusetts has attempted to exercise control over the companies subject to its jurisdiction in three ways—through regulation of service, of security issues, and of rates.

For present purposes the regulation designed to control simply the quantity and quality of the service rendered by utilities may be disregarded. But the control over the security issues of public service corporations antedated the regulation of rates, and is primarily responsible for the unique form of rate regulation which has prevailed in Massachusetts.

FOR a considerable period, Massachusetts relied principally upon the regulation of security issues to secure the consuming public against exorbitant charges. Indeed it is only since the Haverhill Gas Light Company Case [1] in 1912 that the regulation of rates has been of coequal importance with the control of security issues. The regulation of security issues continues to be regarded as of primary importance so that Commissioner Macleod, speaking in 1917, could still say that for Massachusetts such control constituted "the very corner stone of public regulation." [2] Massachusetts was a pioneer state in the regulation of security issues and all types of securities—common and preferred stocks, bonds, coupon notes, and other evidences of indebtedness—are subject to Commission control, the only exception being short-term notes payable at less than a year from date.

To insure an initial equivalence between the par value of the stock issued and the amount of money received therefor, Massachusetts has exercised a strict supervision over the issue of securities at the time of the incorporation of public service companies, the most important requirement being that no shares be issued for less than the par value to be paid in cash.

Soon after the establishment of the Board of Railroad Commissioners in 1869,[3] various statutes were passed placing limitations on the issue of of additional capital stock. Prior to 1871, there was a general requirement that no additional stock should be issued for less than the par value of the outstanding shares to be paid in cash.[4] During this period the stockholders' privilege of having the first chance to participate in new issues was recognized, and each was permitted to subscribe at par for his proportion of the new issue.[5]

IN 1871, a radical change was made in the previous policy by requiring the railroads to sell new shares at public auction, whenever the market value of their stock was above par,[6] and two years later these provisions were extended to govern the issue of additional securities by street railways and gas companies.[7] With

[1] 28 Ann. Rep. Mass. G. & E. L. C. 41.
[2] Proceedings of National Association of Railway Commissioners, 1917, p. 425.
[3] Mass. Acts of 1869, chap. 408.
[4] Mass. Acts of 1851, chap. 133, §§ 8, 16.
[5] Mass. Acts of 1870, chap. 179.
[6] Mass. Acts of 1871, chap. 392.
[7] Mass. Acts of 1873, chap. 39, chap. 305, chap. 333.

these statutes, as with those subsequently enacted, there was an express statement that no authority was given for the sale of stock at less than par. The obvious purpose of this legislation was, by forcing the sale of new issues at the highest possible price, to keep the number of outstanding shares at a minimum, and thus, to keep down the amount that would have to be raised from rates for the payment of dividends.

The adverse criticisms aroused by the acts of 1871 and 1873 were responsible for their repeal so far as applied to railroads and street railways in 1878 and 1879 respectively, when it was provided that the stockholders of these two classes of public utilities should have the privilege of subscribing at par for their proportional part of any new issue of stock.[8]

In all of these statutes limiting the issue of additional securities by public service corporations, it was provided that any shares not taken by the stockholders might be disposed of at public auction, but at not less than their par value. The law of 1873, requiring all additional stock to be sold at public auction, continued to apply to gas companies.

THE contemporary opinion that the rates of public service companies depended upon the amount of the outstanding capital stock was responsible for the enactment of the "anti-stock-watering" laws of 1893 and 1894.

In 1893, it was provided that new shares of railroads and street railways should be offered proportionately to the stockholders *at their market value,* as determined by the Board of Railroad Commissioners;[9] and, in 1894, a law was passed requiring all utilities, when issuing additional stock, to offer such shares proportionately to their shareholders *at not less than their market value,* as determined by the appropriate commission.[10] In the latter year, the amount of any new issue of stock was limited to the amount determined by the appropriate commission to be reasonably necessary for the purpose authorized.[11] These enactments gave the Massachusetts Commissions the broadest powers to control the issue of securities and it was many years before any other Commission or regulatory body had powers at all comparable to those of the Massachusetts bodies.

Adverse criticism from the Commissions, investigating committees of the legislature, the companies, and impartial investigators of the effects of the "anti-stock-watering" laws finally led to their modification after 1908. The requirement that new issues be offered to stockholders at not less than the current market value as determined by the appropriate commission was changed, the new enactments providing that the issue

[8] Mass. Acts of 1878, chap. 84; 1879, chap. 90.

[9] Mass. Acts of 1893, chap. 315.

[10] Mass. Acts of 1894, chap. 472, § 1.

[11] Mass. Acts of 1894, chap. 450, chap. 452, chap. 460. The Board of Gas and Electric Light Commissioners was established in 1885 (Acts of 1885, chap. 314); telephone, telegraph, and water companies were subject to the Commissioner of Corporations. When the Public Service Commission was organized to succeed the Board of Railroad Commissioners in 1913 (Acts of 1913, chap. 784), telephone and telegraph companies were placed under its jurisdiction.

Massachusetts Conception of a Proper Rate Base

"THIS *Commonwealth has been the pioneer in the regulation of public utilities. It has controlled the issue of securities and their price for decades and, as a consequence, has proceeded upon the theory that these securities thus issued constitute the proper base. Stated tersely, it is the money honestly and prudently invested and devoted to the public service that is entitled to earn a fair return. This doctrine grew out of the general practice obtaining in Massachusetts in such matters, and in its fundamental thesis conforms to economic necessities and is based upon the actual facts, as to doctrinaire theories.*"

—PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

price be determined by directors, subject to the approval of the Board of Railroad Commissioners.[12] But the Board was instructed to refuse to approve any particular issue if, in its opinion, the price so fixed was "so low as to be inconsistent with the public interest." [13] A similar amendment to the existing law was passed with regard to gas and electric companies in the following year.[14] Both the existing Commissions and those that have subsequently succeeded them have interpreted this law as requiring the companies to issue additional stock at a premium whenever market conditions made this possible. Any price lower than necessary to secure the sale of a new issue has been held to be inconsistent with the public interest.[15]

In practice, this has meant that the Commissions would approve an issue price of 10 to 20 points below the prevailing market price, to allow for the depression of the market price resulting from an issue of additional stock.

Since 1908, the only significant change in the law relative to the issue of additional stock has been the provision that the Department of Public Utilities might authorize the sale of stock of gas and electric companies at less than par if it considered it impossible to dispose of such new shares at or above their par value.[16]

To further the purpose of keeping at a minimum the stock upon which dividends need be paid, it has been provided, since 1871, that additional issues of stock be restricted to the number of shares necessary to produce the amount of capital required for the authorized purposes.[17] Furthermore, it was provided that

[12] Mass. Acts of 1908, chap. 636.
[13] Ibid. § 3.
[14] Mass. Acts of 1909, chap. 477.
[15] See *Re* Fitchburg & Leominster Street R. Co. 40 Ann. Rep. Mass. R. C. 153–155 (1908); Cambridge Petition, 30 Ann. Rep. Mass. G. & E. L. Co. 36, 39 (1914). See also the quoted testimony of Chairman Attwill before Special Master Warner, Worcester Electric Light Co. *v.* Attwill, P.U.R.1929B, 1, 79.
[16] Mass. Acts of 1922, chap. 226.
[17] Mass. Acts of 1871, chap. 392; 1873, chap. 305; 1874, chap. 372, § 46; 1893, chap. 315; 1894, chap. 472.

new stock might not be issued to an amount which would exceed the fair value of the property of the utility, and the regulatory boards could require any such impairment of capital to be made good as a condition of an order approving a new issue of securities.[18] Furthermore, since 1894, the amount of capital reasonably necessary for any authorized purpose has been subject to the determination and approval of the appropriate Commission.[19]

The issuance of preferred stock has likewise been surrounded with restrictions relative to the procedure, the proportion to be kept between the preferred and common stocks, the terms of preference, etc. In general, the amount of preferred stock that might be issued has been limited to the amount of common stock outstanding;[20] but railroads, street railways, and hydroelectric companies have been permitted, with the approval of the appropriate commission, to issue preferred stock to a maximum of twice the amount of the outstanding common stock.[21]

THE limitations placed upon the power of public utilities to issue stock has been accompanied by restrictions upon the funded debt which have taken the form of defining the terms of the mortgage, limiting the amount of the debt, specifying the par value, the issue price and interest rates, limiting the term of the bonds, etc. It has been the general policy of Massachusetts to limit the amount of bonds that might be issued to the amount of the outstanding capital stock. The railroads and street railways have received more liberal treatment in the amount of indebtedness they might incur, being permitted, with the approval of the Commission, to issue bonds, notes, and other evidences of indebtedness to twice the amount of the paid-in capital.[22] Although gas and electric companies are the only ones explicitly prohibited from issuing bonds at less than par,[23] the practice of issuing bonds at less than par has been discouraged by the Massachusetts Commissions.

Since 1922, there have been no statutory provisions specifying the rates of interest that may be borne by the bonds of public service companies. But since all security issues must have the prior approval of the Department of Public Utilities, there is still the possibility of the interest rate being scrutinized by the regulatory authorities. At the present time there appears to be no restrictions as to the term for which public utility bonds may be issued, but such restrictions were found on the statute books down to 1921. In connection with the regulation of the rates and charges of public utilities in Massachusetts, it

[18] Mass. Acts of 1874, chap. 29, § 15; 1887, chap. 336; 1896, chap. 409; Revised Laws of 1902, chap. 109, § 26.

[19] Mass. Acts of 1894, chaps. 450, 452, 462; 1906, chap. 463, pt. II, §§ 65, 66; 1913, chap. 784, § 16; 1914, chap. 742, § 39. General Laws of 1921, chap. 159, § 52; chap. 160, § 48; chap. 161, §§ 25, 28; chap. 164, §§ 14, 18; chap. 166, § 4; and Acts of 1921, chap. 230, § 2.

[20] Mass. Acts of 1902, chap. 441; General Laws of 1921, chap. 155, § 18.

[21] Mass. Acts of 1902, chap. 441, § 1; 1913, chap. 764, §§ 4, 5; 1915, chap. 299, § 3; 1916, chap. 64. General Laws of 1921, chap. 160, § 45; chap. 151, § 35.

[22] Mass. Acts of 1912, chap. 725, pt. II, §§ 4, 5; General Laws of 1921, chap. 160, § 47, chap. 161, § 25.

[23] Mass. Acts of 1886, chap. 346, § 3; General Laws of 1921, chap. 164, § 13; 1922, chap. 223; 1924, chap. 173.

is significant to note that one of the earliest limitations placed upon corporate stock issues was the prohibition of stock and scrip dividends. In 1868, a statute was enacted forbidding railroad, telegraph, and gas companies to issue stock or scrip dividends;[24] and, in 1894, the same prohibition was extended to other utilities—telephone, electric light, and water companies.[25] The purpose of this restriction was to prevent stock watering and to restrain the utilities from issuing stock to represent earnings plowed back into the property. All of the Commissions have consistently denied the utilities' right to capitalize reinvested earnings, at the same time that they have urged the companies to reinvest such earnings. This question, with the allied problem of the right of the companies to earn a return upon reinvested surplus, is today one of the significant issues in Massachusetts regulatory policy and will be considered below.

The comprehensiveness of the regulation of security issues by the Massachusetts authorities is further instanced by the limitations which surround the right of public service corporations to hold stock in, or guarantee the bonds of, other corporations, and by the regulation of security issues in consolidations and reorganizations.

WITHOUT pausing to pass judgment upon this phase of the Massachusetts regulatory program, it is appropriate, by way of summary, to consider briefly the purposes of the many restrictions which, from time to time, have been imposed upon the issuance of securities by public utilities in that state. All regulation of businesses "affected with a public interest" finds its principal goal in holding the cost to the consumer at the lowest sum consonant with satisfactory service; and the regulation of securities has concentrated on minimizing the burden of capital charges on the utility's earnings. This legislation has been based on the assumption that the return to investors in public service companies should be primarily determined by estimating a fair percentage upon the capital issues of the company, and, hence, all statutes bearing upon security issues were designed to keep the capitalization of the utilities as low as possible. To avoid any unnecessary duplication in capital expenditures, competition among utilities has been excluded. At the incorporation of a utility, the original issue of securities has been restricted to the sum actually invested by the stockholders. All increases in capital stock have been minimized; *first,* by authorizing only the amounts reasonably necessary for the specified purposes; *second,* by compelling the sale of new shares at a premium whenever market conditions permitted in order to realize the requisite amount of money from the smallest number of shares. To prevent the surplus built up from reinvested earnings being made the basis of dividend charges, stock dividends have been prohibited. To keep the fixed charges as low as possible, limitations have been placed upon the relative amount of funded debt that might be incurred; and when possible, the Commissions have required the utilities to

[24] Mass. Acts of 1868, chap. 310.
[25] Mass. Acts of 1894, chap. 350.

raise funds by issuing stock rather than bonds. Although the purpose of this regulation has been to prevent the consumers from being burdened with heavy charges for the payment of dividends, yet there has very wisely been no explicit limitation upon the rate of dividends that might be paid. It has generally been recognized that the normal rate of return was not to be measured by the same percentage rate upon the capital of each company.

THE importance and influence of this long continued control over the capitalization of public utilities upon the policy of rate regulation developed in Massachusetts cannot be overemphasized. The control of capital issues has long been an indispensable part of the regulatory program of that state; and as regards its relation to the utilities within its jurisdiction, the state occupies a unique position.

There is virtually no overcapitalization of the public service companies local to the state. But more important still, as a result of this control of capitalization and supervision of accounts, the Massachusetts authorities know exactly what sums have been invested by the shareholders of the local companies. With this information at their command, it is but natural that the Massachusetts Commissions should be strongly inclined to consider the amount of the investment in a company as the dominant factor in deciding what return that company should be permitted to earn.

DIRECT Commission regulation of rates in Massachusetts was a much later development than the program of control over securities.

When the Board of Railroad Commissioners was established in 1869, it had only very limited powers respecting rate regulation. It was authorized to conduct investigations and to recommend to the railroads changes in the rates and charges, but the railroads were under no compulsion to comply with such recommendation. It speaks well for the calibre of the early Commissioners that, compelled to rely simply upon public opinion to persuade the railroads to adopt their recommendations, they were still able to exercise fairly effective regulation for a period of some forty years.

The circumstances surrounding the creation of the Board of Gas and Electric Light Commissioners in 1885 were responsible for conferring upon this body somewhat more extensive powers to regulate the rates, first of gas companies,[26] subsequently of electric light companies,[27] and finally of water companies.[28] It was the inability of the Board of Railroad Commissioners to issue mandatory orders to support their findings in rate investigations that finally undermined public confidence in that Board and led to its abolition in 1913. The Public Service Commission was set up in its stead and given full and complete power to regulate the rates of all utilities subject to its jurisdiction. This Commission was given the power to undertake investigations either upon its own motion or upon receipt of a complaint and to determine and fix just and reasonable rates either by

[26] Mass. Acts of 1885, chap. 314, § 9.
[27] Mass. Acts of 1887, chap. 382.
[28] Mass. Acts of 1914, chap. 787.

A Unique Regulatory Policy

"THE control of capital issues has long been an indispensable part of the regulatory program of Massachusetts; and as regards its relation to the utilities within its jurisdiction, the state occupies a unique position."

raising or by lowering existing rates.[29] The powers of the present Department of Public Utilities in the regulation of the rates and charges of public utilities are substantially the same as those exercised by the Board of Gas and Electric Light Commissioners and the Public Service Commission at the time of their abolition.[30] Its powers over common carriers are thus somewhat more extensive than those possessed over gas and electric light companies; but for all practical purposes its powers in the matter of rate regulation are full and plenary.

THE so-called Massachusetts theory of rate regulation, that public service companies are entitled to earn a return upon the capital honestly and prudently invested, is a relatively recent development—being clearly announced for the first time in the Middlesex and Boston Case in 1914.

Prior to that case, there had been some scattered hints that the Massachusetts Commissions were inclined to regard the sums invested by the stockholders as the natural basis upon which a utility should be permitted to earn; as when the Board of Gas and Electric Light Commissioners stated in 1887 that:

> "Capital . . . , prudently devoted to these objects, is entitled to fair compensation.[31]

or when in 1904, the Board of Railroad Commissioners stated:

> "That a company is entitled to a fair return upon actual investment is a rule so often announced as to have become somewhat stale in the statement." [32]

But these early statements seem to have had little, if any, influence upon the later cases; for in the Haverhill Gas Case, the Board sanctioned an increase in rates, with no mention or discussion of prudent investment.[33]

In the Middlesex and Boston Case, there occurs the first explicit statement of the "Massachusetts rule"—

> "Accordingly, we rule that under Massachusetts law capital honestly and prudently invested must, under normal conditions, be taken as the controlling factor in fixing the basis for computing fair and reasonable rates. . . ." [34]

In this case the representatives of the public, opposing the proposed advance in fare, contended that the company be permitted to earn only upon the present value of its property

[29] Mass. Acts of 1913, chap. 784, § 22.
[30] Mass. Acts of 1919, chap. 350, §§ 117, 120.
[31] 3 Ann. Rep. Mass. G. & E. L. C. 68, 69 (1887).
[32] *Re* Warren, Brookfield & Spencer Street Railway, 36 Ann. Rep. Mass. R. C. 19 (1904).
[33] 28 Ann. Rep. Mass. G. & E. L. C. 41 (1912).
[34] 2 Ann. Rep. Mass. P. S. C. 99, 111 (1914).

which figure, because of the presence of a large amount of accrued depreciation, was considerably less than the investment. The company was in such desperate financial straits, however, that the Commission considered it essential to permit an increase in rates in order to prevent an imminent breakdown in service. Thus the so-called Massachusetts rule was first developed and used, not to prevent a utility from earning a return upon the present value of its used and useful property, but to permit an increase in charges, which could not have been justified under a strict application of the Federal present fair value rule. The rule here announced was followed and elaborated by the Public Service Commission in the later street railway rate cases that came before it.

DESPITE the emphasis placed upon "prudent investment," there has been no exact definition of the term.

As originally used by the Public Service Commission, prudent investment was assumed to be measured by the aggregate par value of the outstanding securities; *i. e.*, it was assumed that investment and capitalization were equal.[35] The present Commission, recognizing that premiums paid in by the shareholders on the purchase of stock from the utility are also a part of their contribution to the utility's capital, seems to have used the term more accurately as representing the aggregate par value of the outstanding securities plus paid-in premiums, thus making prudent investment the equivalent to the amount of money actually paid in to the corporate treasury by the investors.

As indicated above, the Commissions have refused to recognize reinvested earnings as a part of the investment.

There is room for some difference of opinion as to whether the present Department of Public Utilities has accepted and applied the rule developed by the Public Service Commission, that the capital honestly and prudently invested be taken as the measure of the rate base upon which public utilities in Massachusetts should be permitted to earn a return.

In the New England Telephone Company Case in 1926, the opinion of the Commission, literally interpreted, would seem to be conclusive evidence of such acceptance of the prudent investment base. In this case, the line of reasoning adopted makes it quite clear that the Massachusetts policy, so far as it is unique and distinctive, is a logical outgrowth of the early and continued regulation of security issues of public utilities. With respect to the appropriate rate base, the Commission stated:

> "This Commonwealth has been the pioneer in the regulation of public utilities. It has controlled the issue of securities and their price for decades and, as a consequence, has proceeded upon the theory that these securities thus issued constitute the proper base. Stated tersely, it is the money honestly and prudently invested and devoted to the public service that is entitled to earn a fair return. This doctrine grew out of the general practice obtaining in Massachusetts in such matters, and in its fundamental thesis conforms to economic necessities and is based upon the actual facts, as opposed to doctrinaire

[35] Middlesex & Boston Rate Case, 2 Ann. Rep. Mass. P. S. C. 99, 111.

theories. No evidence was presented that the company's outstanding securities do not now represent property of their face value or that the company is not entitled to earn a fair return upon its outstanding securities and the par value of its capital stock, or, to put it in practical terms, to earn enough thereon to keep the price of its stock above par." [36]

In this case again the prudent investment rule of Massachusetts was resorted to in justification of an increase in the existing rates.

THE statements of the various members of the Commission in the Worcester Electric Light Company Case, taken at their face value, would seem to indicate continued adherence to the Massachusetts rule. In the Commission's opinion written, apparently, by Chairman Attwill, and concurred in by Commissioner Goldberg, it is said that the law does not require the adoption of present fair value as the rate base in Massachusetts. In the course of the report, the following statement appears:

"Regulation should be certain, definite, and capable of speedy application in the determination of rates which will do justice both to the public and to the owners of the utility. We believe that a rate base, which takes as the controlling factor capital honestly and prudently invested, possesses these qualifications and under normal conditions is sound both in law and in economics." [37]

Commissioner Stone introduces his concurring opinion by saying:

"I desire, however, to point out some of the reasons why I believe our so-called Massachusetts rule should be controlling with our local gas and electric companies. . . ." [38]

After quoting with approval the statement of the Massachusetts rule in the Middlesex and Boston Case, he adds:

"By the application of this rule, no one is unfairly treated. It is just alike to the stockholders and the ratepayers. To the stockholders, in that the company is entitled to charge such rates as will yield a fair return upon their investment, and the ratepayers, in that they will be required to pay no more than a fair return on that investment." [39]

And,

"If the money paid into the treasury of the company has nothing to do with establishing the rate base, it would seem the only supervision of the issuance of the securities of those companies that would be required would be to keep a record of the number of shares they issue, and that the various legislative enactments relating to issues of securities of our local companies since their incorporation, and which were designed to protect and safeguard the conflicting interests of both the investor and the ratepayer, will be of no moment." [40]

IN a separate opinion, Commissioner Hardy states his position in these terms:

"I concur in the opinion of the Commission in so far as it relates to a return upon capital honestly and prudently invested and devoted to the public service, known as the Massachusetts doctrine, and it is unnecessary to repeat the statement here. I do not now subscribe to so much of the opinion as enters into a discus-

[36] *Re* New England Teleph. & Teleg. Co. P.U.R.1925E, 739, 744.
[37] Customers *v.* Worcester Electric Light Co. P.U.R.1927C, 705, 710.
[38] Customers *v.* Worcester Electric Light Co. P.U.R.1927C, 705, 715.
[39] Ibid. 718.
[40] Ibid. 720.

sion of a return upon the reproduction or present day cost less observed depreciation theory because of my feeling that at the present time we should proceed as we have proceeded for years, that the Massachusetts laws applicable to the issue here should be adhered to and the case decided accordingly."

" . . . I feel that in view of recent happenings that the time has arrived when the rate-paying public of Massachusetts should definitely know whether its anchorage in rate fixation matters is or has been a real or an imaginary one." [41]

Commissioner Wells contents himself with observing:

"I agree with Commissioner Hardy that the time has come to find out whether the long period of regulation in this commonwealth under Massachusetts laws, under which these lighting utilities have prospered, is to come to an end, and whether, as pointed out in our recent report, it is necessary for the legislature to take steps to avoid the result outlined above." [42]

THESE statements of the attitude of the several Commissioners would appear to justify the conclusion that, at least on the date when this decision was announced, the present Massachusetts Commission still adhered to the Massachusetts rule, as pronounced by the Public Service Commission in the Middlesex and Boston Case, modified to include premiums paid in to the corporate treasury.

Even in this case, despite the emphasis placed upon the justice and equity of the Massachusetts rule, the rate base suggested was much in excess of the sum paid in to the corporate treasury by the investors. The total investment by the stockholders (exclusive of reinvested earnings, but including the capital stock at par value plus the paid-in premiums) was $4,058,232, while the value assumed for the rate base was said to be $10,000,000. Thus it is quite evident that, strictly considered, there was no exact application of the "Massachusetts rule" here.

For the first time in the history of rate regulation in Massachusetts, the company appealed to the Federal District Court, alleging that the rates ordered by the Commission were confiscatory, and secured a temporary injunction.[43] It was after the company began action to have the Commission's order set aside that we had the first explicit statement by a Massachusetts official that they did not consider themselves to be applying the so-called "Massachusetts rule" of prudent investment.

IN reply to some remarks in an address by Mr. William A. Prendergast of New York, Mr. Henry G. Wells made the following statement regarding the situation in Massachusetts:

" . . . Whatever may be the opinion of different individuals as to whether prudent investment is a proper rate basis or not, since the consolidation of the departments in Massachusetts in 1919, the Commission has not considered prudent investment as the Massachusetts theory. I am not at all surprised that the general public throughout the country has felt that that was the Massachusetts theory, that the Massachusetts theory on which rates

[41] Customers *v.* Worcester Electric Light Co. P.U.R.1927C, 705, 723.
[42] Ibid. 724.
[43] Worcester Electric Light Co. *v.* Attwill, 23 F. (2d) 891, P.U.R.1927E, 796.

were based was prudent investment. It grew up out of a decision before the consolidation a great many years ago in a street railway case where there had been a depreciation in the value of the property. The representatives of the public attempted to set up as a rate basis upon which the rates on that street railway should be figured, the reproduction cost theory, which was manifestly less than was indicated as prudent investment.

"The Commission fixed the rates—the old Public Service Commission fixed the rates on prudent investment because they felt that the stockholders had honestly and prudently invested their money in the property, and that the fact that the value of that property was less than that prudent investment was of no moment. That is the origin of the so-called 'Massachusetts rule' of prudent investment, and as you see it arises from an entirely different conception than is usually held." [44]

As has been previously noted, the so-called Massachusetts rule of prudent investment is the only basis that has been mentioned by the Massachusetts Commissioners as constituting an appropriate rate base. Nevertheless, Commissioner Wells is right in his position that "since the consolidation of departments in Massachusetts in 1919 the Commission has not considered prudent investment as the Massachusetts theory."

An examination of all the reports of the present Department of Public Utilities reveals no case in which the company has been strictly held down to a rate base measured by the par value of its capital stock or by the par value plus the premiums paid in by the stockholders.

[44] Proceedings of National Association of Railroad and Utilities Commissioners, 1927, pp. 113, 114.

At this point it may be worth while to observe parenthetically the attitude of various officials of public service corporations operating in Massachusetts respecting the Commission's policies.[45] Until quite recently, the majority of these men were seemingly of the opinion that the Massachusetts Commission regulated rates and charges in accordance with the prudent investment rule. But according to their definition, prudent investment included all elements of cost to the utility, whether incurred for physical plant and equipment or for intangible overheads, whether derived directly from the stockholders through the sale of stock or indirectly through reinvested earnings. In the opinion of one official, the Worcester Electric Light Case was the first in which the rates allowed failed to cover all such elements of cost. When asked why the utilities did not seek a higher rate base as measured by the reproduction cost less accrued depreciation, the reply was generally to the effect that the rates and charges which would yield the maximum net income could be justified on either the prudent investment base or on the cost of reproduction new less accrued depreciation; and that since this was so it would be impolitic to seek the latter base when it might antagonize the regulatory authorities and the consuming public.

[45] The facts here given are the result of personal conversations with a number of men closely associated with various Massachusetts companies.

(The second and concluding article of this series will treat further of the practice of the Massachusetts Commission in the regulation of rates and of the Commission's attempts to avoid the necessity of complying with the federal present fair value rule.)

Remarkable Remarks

FRANKLIN D. ROOSEVELT
Governor of New York.

"It appears to me that the policy of Public Service Commission regulation has broken down and proved itself ineffectual for the purposes originally intended."

THOMAS A. EDISON
Inventor.

"Water power is a political issue, not a business one. It can never at the best mean very much to us except as something to talk about."

H. J. GONDEN
Publisher "Public Service Magazine."

"The people of this country don't care a hang about how big business gets so long as it produces desired results."

JOSEPH NORTH
Publicity director for the Gastonia Joint Defense and Relief Committee.

"The college man of today is the product of the subsidized college, as much as Senator Reed, of Pennsylvania, is the product of the subsidized Senate."

THOMAS N. MCCARTER
President, Public Service Coordinated Transport.

"If the history of transportation in this country proves anything at all, it proves that indiscriminate competition among common carriers inevitably leads, in the end, to poor service and high rates."

ED HOWE
Retired newspaperman and philosopher.

"There are two currents of opinion in America: public and private. Public opinion is pretty generally faulty; it must be overcome and corrected by sound private opinion."

GILBERT H. MONTAGUE
New York lawyer.

"Never has the Government gone so far as during the past year in its encouragement, support, and enforcement of business self-government by business and trade groups."

WALTER WINCHELL
Broadway columnist.

"'Idiot' originally meant a 'private man'—one not engaged in business. The present meaning grew from the idea that such people were out of touch with things and ignorant."

R. T. HIGGINS
Chairman, Connecticut Public Utilities Commission.

"If we ever have Government ownership of public utilities in this country it will be brought about by the utilities themselves combining and operating for unreasonable private gain and against general public welfare."

CHARLES W. NORRIS
U. S. Senator from Nebraska.

"One need not be connected with a propaganda to be the subject of investigation; one need merely be a lobbyist or a person seeking to influence national legislation."

FLOYD W. PARSONS
Economist.

"It is an amazing spectacle to see the richest Nation on earth bidding as high as 20 per cent for money, not to stabilize prices, nor to strengthen the productive power of industry, but merely to finance a form of activity that takes money from many pockets and puts it in a few."

JAMES P. BARNES
Ex-President, American Electric Railway Association.

"We cannot scoff at busses. We must not sneer at taxicabs. We may not ignore the other *quasi* public forms of transportation service. We are squarely challenged to adapt our means and our methods to the most useful general scheme of public transportation and we must accept the challenge."

EDWARD N. HURLEY
Former Chairman, Federal Trade Commission.

"Inherently the man in politics is no better or worse than the man of private business. But he is in another kind of a game. He plays according to different rules. He does not try to play poker by the rules of auction bridge. In business a man plays for profits—in politics he plays for votes."

J. W. McIVER
Manager of Publicity, Edison Lamp Works.

"A few years ago a lot of people thought that if a railroad advertised its service, exhibited any evidence of salesmanship, that it would be as unethical as if a doctor had advertised. But, today, the railroads have had to tell the people the superior advantages of railway travel because of the great popularity of traveling by automobile, bus, and airplane."

PRESTON S. ARKWRIGHT
President, Georgia Power Co.

"Today electric light actually costs less than natural light inside the house. Daylight in the great out doors is free, but it costs money to bring it in behind the walls. If you will add up the costs of placing windows, of maintaining shades, curtains, hangings, of washing panes, of laundering curtains, you will find this statement true. If you add to this the extra cost frequently incurred for areaways and light wells, and walls set back from property lines so light may enter, you will soon discover that it's more than true. As a matter of fact, based on comparative values and prices electric light is the cheapest thing that people buy."

GOVERNOR ROOSEVELT'S statement that telephone and electricity rates are unequal in various communities cannot be disputed. But the statement that such rates are "unfair" opens up some fundamental and highly controversial economic questions that are presented in the following article.

THE DISCRIMINATORY FEATURES OF

"Uniform" Utility Rates

When Are They Justified on Grounds of Broad Public Policy?

BY DAVID LAY

GOVERNOR Franklin D. Roosevelt of New York, in a speech at the state fair on August 29th, attacked the inequality of telephone and electric rates. He declared the situation manifestly unfair—particularly to rural patrons. He is quoted as saying in part:

> "It is, of course, well known that the cost of the telephone to the farmer, for example, depends very largely on what county and even more on what particular road he happens to live.
>
> "If he happens to be born on a farm on a highway away from neighbors, he has to shoulder practically the entire original cost and upkeep of his telephone line; whereas, if he happens to live close to many neighbors the cost of the very essential telephone is enormously reduced, both for service and installation charges. . . .
>
> "The other example, and one which is even more glaring in its unfairness, is that of the use of electricity in the homes. The railroad principle of fairly uniform rates has been thrown to the winds even by the public regulating body known as the Public Service Commission.
>
> "Is it not time to stop and ask the question: 'Why does electricity in the home, the electric lights, electric refrigerator, electric sewing machine, the home machinery, cost as high as from 15 to 20 cents per kilowatt hour in some localities and as low as from 4 to 6 cents per kilowatt hour in other localities?'"

THE statement that rates are unequal in various communities cannot be disputed. But the statement that this is unfair deserves serious consideration. The acceptance of that accusation and attempts to remedy it by making all rates uniform may be fraught with economic dangers unforeseen by those not familiar with public utility rate making—no matter how zealous they may be on behalf of the public welfare.

Let it be understood at the outset that we mean uniform and equal in the usual sense, and not uniform under a plan for uniform rates under similar conditions, as we understand they are contemplated by the New York Commission in its so-called "Uniform Rate Investigation."

The words "similar conditions" are important. Comparisons of rates have repeatedly been rejected as a measure of reasonableness. The same conditions must be shown to justify the same rates.

THE economic problem seems to be this: If, in order to make all rates uniform, profitable customers are forced to make up large losses sustained in service to unprofitable customers, this is not only discrimination in favor of the latter but may stifle the growth of the utility business. On the other hand, this discrimination may be justified if the burden of loss from less profitable customers is not so great as to create an appreciable load for the others. If the public benefit from complete electrification of the state, including remote and widely separated farms, can be brought about by a uniform system of rates which because of uniformity do not unduly increase charges to patrons in congested districts, it may be a wise public policy to have uniform rates, for the good of both the utilities and their customers.

But, if such uniformity can be had only by shifting heavy expense from rural customers to city customers, with a consequent retarding of development, then the policy of uniform rates is economically unsound. This is a question of fact which must be worked out by experts. Their studies must disclose the extent of uniformity which will result in the greatest public benefit.

FOR electric service there is some precedent in support of the Governor's theory. A notable instance was in Georgia. Whether conditions in New York, or other states with large urban population, justify the same policy is not yet clear. The Georgia Commission inaugurated uniform rate schedules throughout the state. The situation there is well stated in the Commission's report:

> "Due to the extension of its lines and mergers of other properties the present operations of the Georgia Power Company cover a very large portion of the state, and as a result of these mergers and consolidations there is no uniformity in the rates for this class of service. In fact, at this time there are twenty-two different schedules of rates, in the various communities served, applying to this class of service.
>
> "It has been the policy of the Commission in the past to prescribe a slightly higher rate for small communities than for congested centers when served by the same company, and the source of power being confined to one point of production. Such method of prescribing rates for the Georgia Power Company has been followed in the past and this accounts to some extent for the variation of rate schedules. The justification for this method of prescribing rates is obvious, on account of the slightly added cost in serving a thinly populated town, as compared with a large city, and the added expense of transmission lines from the source of production. The properties of the Georgia Power Company have so changed as to make them inseparably connected, and there can now be no justification for lower rates in large centers. It is, therefore, our conclusion that one schedule of rates for residential customers should be made to apply to all customers alike throughout the state." [1]

[1] *Re* Georgia Power Co. (Ga.) P.U.R. 1929B, 156. See also *Re* Alabama Power Co. (Ala.) P.U.R.1929A, 458.

VIEWING the question of uniform rates as a problem of doing justice to consumers, whether rural or urban, it is not apparent how we can escape the conclusion that uniform rates would be discriminatory. As a broad principle governing our economic structure, the cost of commodities everywhere depends—and must depend—largely upon location, because, for one reason, accessibility to market is one of the factors controlling cost.

Some necessities and luxuries of life are cheaper in the cities; others are cheaper in rural communities. Agricultural products are cheapest where they are produced; manufactured products are cheapest where they are produced. The cost of transportation cannot be overlooked. Land is cheaper outside of cities—but those outside must pay for transportation to industrial centers, where wages are higher. We cannot have our cake and eat it. If we want location, we must foot the bill.

Flood protection on the Mississippi is a commendable enterprise. Human life must be conserved. But those who settle in flood lands buy their land at a low price. The question has been asked, why should those who buy higher priced land in safer communities bear the expense of improving flood lands for those who bought it cheap? Everywhere it is the same. A cheap location cannot have the advantages of a more costly location.

How can it be different in the case of public utility service? A small electric plant serving widely scattered consumers must incur a larger expense per customer than a large plant in a closely settled community. Is it fair that the consumers of the latter help to carry the burden of the former in order to have uniform rates?

THIS brings us to a subject which is much misunderstood—the unavoidable and continual conflict of interests between public utility patrons. The owners of the enterprise must secure from rates enough to pay for the cost of rendering service. When this amount is determined, it is entirely a question of dividing that cost fairly between the customers. If one class does not pay enough, another class pays too much. If a company serving both rural and city consumers charges all the same rate (while city costs are less) the city consumers are paying too much and rural consumers are paying too little.

This principle was given recognition in a case in Wisconsin. So-called loop rates were fixed by the Commission for electric service on the theory that a hydroelectric utility should collect uniform rates on its loop of transmission lines originating at a water power plant and passing through various sections of the state. The Commission order was reversed by the Wisconsin supreme court, which pointed out that the Commission could not deprive a municipality of the advantage of its location and make it bear the burden of a portion of the cost of carrying current to a distant city.[2]

IF a public utility is to get a full return in any event, why is it concerned with the question of making each customer bear his own share?

If customers think rates should be

[2] Eau Claire *v.* Railroad Commission, 178 Wis. 207, P.U.R.1922D, 666.

Uniform Rates Are Discriminatory

"If, in order to make all rates uniform, profitable customers are forced to make up large losses sustained in service to unprofitable customers, this is not only discrimination in favor of the latter but may stifle the growth of the utility business. On the other hand, this discrimination may be justified if the burden of loss from less profitable customers is not so great as to create an appreciable load for the others."

equal without modifications according to conditions, what can the utility lose?

We might reply that the companies desire to make each customer treat every other customer fairly, but let us look further and not base our answer on any grounds which might be met with skepticism by those who are uncharitable enough to believe that all business is selfish. As a matter of good business practice it is to the advantage of any company to have its customers treated fairly; and, perhaps most important of all, properly constructed rate schedules placing the burden where it belongs tend to increase business, which in the end is beneficial to both customers and public utilities.

An example of this is to be found in the case of electric companies. A company may make a flat rate to all which is moderately high, or it may grant a lower rate per unit to those who use more current. The natural result of the latter plan of rate making is that many consumers will avail themselves of the many labor-saving devices which make life more enjoyable and they will become larger consumers. They are not compelled to make up losses sustained by customers who use scarcely enough current to pay the cost of keeping their accounts and keeping facilities ready to meet their demands. Any company is more prosperous when a majority of its patrons use a large amount of electricity than it is when, under higher rates, all consumers feel that the use of modern appliances is too expensive.

Unquestionably there are limits beyond which it is improper and impractical to go in making apportionments of expenses to impose them exactly upon those for whom they are incurred. No one would seriously assert that people in a single community should pay on the basis of distance from an electric plant, but that is far different than an assertion that the rates in different communities should be equal. A practical grouping of classes of customers has been found desirable.

The Governor's contrast of uniform railroad rates with unequal electric and telephone rates seems scarcely tenable. Many factors enter into the transportation business which put it in a class different from these other enterprises. But, looking fur-

ther, we find that railroad rates are not uniform to all, but only uniform per mile. The person who lives far from a shipping point pays more freight than those nearby. In the same way a person who lives far from a generating plant or a telephone exchange may have to pay more than those more fortunately located. It might also be noted that branch railroads are not built into every hamlet of the state.

So far as the criticism of unequal rates concerns telephone service, a different situation is presented than in the case of electric service. Here the inequality in rates *favors the rural and small town sections*—but for a very good reason. Not only the value of telephone service but also the cost of that service per customer is greater in large exchanges. A subscriber who can pick up his telephone and talk with any one of 10,000 other subscribers without paying toll charges gets more value from his instrument than a subscriber who can select from only a few hundred names in a small exchange. The complexity of telephone equipment increases with the multiplying of subscribers' stations and the cost must increase accordingly. This is a recognized condition in the making of telephone rate schedules.[3]

THE Governor points out that if a farmer happens to be born on a highway away from neighbors, he has to shoulder practically all the cost of his line, whereas, if he happens to live close to many neighbors, the cost of the service is materially reduced. Again we must suggest that this is the inevitable result of location. If the isolated farmer did not meet his special expense, other subscribers would be forced to do so.

The lower telephone rates in rural areas apply, of course, only where there is some semblance of a composite community. Where individual subscribers are at such a distance from the main body, there must be considerable extra expense to run wires to their homes. This expense is properly placed upon those for whom it is incurred.[4] This does not mean that extra charges can be collected for normal rural extensions.[5]

The Governor is quoted as saying:

> "The underlying theory covering all public utilities is that they receive the privilege of the special franchise from the people of the state themselves, and that for this privilege they must give the best possible service equally to all citizens."

He believes that this principle has not been carried out with regard to telephone and electric service.

WHAT is equal, nondiscriminatory service? Is it the rendering of exactly the same service to each person at the same rate, or is it the furnishing of service to each person upon

[3] Public Service Commission *v.* Mountain States Teleph. & Teleg. Co. (Mont.) P.U.R. 1924C, 545; *Re* Mountain States Teleph. & Teleg. Co. (N. M.) P.U.R.1923B, 352; *Re* New York Teleph. Co. (N. Y.) P.U.R.1923B, 545, 635; *Re* Chesapeake & P. Teleph. Co. (W. Va.) P.U.R.1925C, 570.

[4] *Re* Luxemburg Teleph. Co. (Wash.) P.U.R.1927C, 743; Hart *v.* Bureau County Independent Teleph. Co. (Ill.) P.U.R.1916E, 285; Burch *v.* Chesapeake & P. Teleph. Co. (Md.) P.U.R.1916D, 527; *Re* Platte County Independent Teleph. Co. (Neb.) P.U.R. 1922D, 303; Cedar Fort *v.* Mountain States Teleph. & Teleg. Co. (Utah) P.U.R.1924D, 12.

[5] Wikum *v.* Wisconsin Teleph. Co. (Wis.) P.U.R.1920A, 356; Hyde *v.* Vincent-Bethel Teleph. Co. (S. D.) P.U.R.1919E, 655.

the same terms, namely, the payment of the cost of the service he receives?

The latter interpretation has been accepted in public utility regulation. Rates are based on the cost of service. An equal rate for cheap service and for expensive service is the illegal discrimination which is repugnant to our ideas of justice. In the field of taxation we find the rule that taxation shall be equal, but this does not prevent graded income taxes or a high tax rate in cities and a low tax rate in villages.

FROM this study of the theory of rate regulation based upon the cost of service, it seems that there is no justifiable basis for alleging discrimination against those who are required to pay higher rates because of their location, but on the other hand there would be discrimination if other customers were forced to make up losses sustained by charging them too little. Still, as suggested in the beginning, it may be that a certain amount of *discrimination in favor of rural patrons* is desirable,—if thereby the entire business can be expanded so that the utilities may serve every person in the state, and by such huge development ultimately serve all at lower rates.

That, however, is a question of policy—not a question of right or wrong to rural consumers. It would be a matter of discriminating theoretically against the consumers who do not cause so much expense in order that all may profit.

All discrimination is not unjust. It is largely a question of so constructing rates that the outlying customers may have service at the lowest possible rates without imposing a real, substantial burden upon the others, in order that the public as a whole may benefit.

Uniform Rates in Alabama

IN an editorial on the foregoing subject appearing in our October 3rd issue, we reviewed the uniform residential rates in Georgia and said, "there is reported a similar movement afoot before the Alabama Commission." The movement we referred to concerned only power and commercial lighting rates. The Alabama Commission had already put into effect uniform domestic rates, on December 31, 1928, which did not affect rural rates.

A letter from Commissioner Frank P. Morgan, calling our attention to this point, makes the Alabama situation quite clear and it will be published in an early issue.

What Others Think

Some Defects in the Present Depreciation Accounting Methods for Public Utilities

DEPRECIATION is a subject to which most careful attention has been given by economists for a number of years. Needless to say, those who are most familiar with the practical details of the problems connected with this phase of business management are not in entire accord.

Mr. L. R. Nash, a well known economist and vice-president of Stone & Webster, who has had long practical experience with accounting questions, has made a valuable criticism of the two major systems of depreciation accounting for public utilities in use in this country in a paper on "Depreciation Accounting Methods for Public Utilities," read at the September International Congress on Accounting.

MR. Nash points out that there are two major systems of accounting for utilities in the United States:

(1) The system developed by the Interstate Commerce Commission for interstate carriers and a similar system for communication companies under its jurisdiction; and,

(2) The uniform system developed by the State Commissions for local utilities under their jurisdiction.

Mr. Nash declares that in general there are few fundamental differences between the two systems; both embody recognized and established accounting principles. But there is a striking difference between the Interstate and the state systems with respect to depreciation accounting. Of the Federal system, Mr. Nash says:

> "The Interstate system used by carriers and communication companies, and similar systems adopted by the Federal Power Commission and to some extent by Federal income tax authorities, are based on the general theory that utility property is gradually consumed in service, that the useful life and salvage value of the various property elements are known with reasonable accuracy, and that uniform charges should be made in operating expenses for currently accruing depreciation. This is not done for the property as a whole, but major units or groups of similar units must, under existing practice, have separate subsidiary reserve accounts provided for their retirement, and deficiencies in one of these accounts may not be made up from excesses in another. In other words, the charge against any subsidiary reserve in connection with a particular retirement is limited to the amount previously accrued therein with respect to the units of property involved. This so-called straight-line system of depreciation charges is intended to create and maintain a reserve consistently equal to the accrued depreciation of the property, and under Interstate regulatory practice it is considered appropriate to deduct such reserves in determining the fair value of the property. However, this latter practice is not approved by the Federal Courts."

HOW the state theory differs from Federal theory is thus explained:

> "The state system of accounting involves a quite different theory and provides a reserve for retirements rather than depreciation. In fact, the word 'depreciation' does not anywhere appear in the state system of accounting. This system proceeds upon the assumption that it is not practicable, or at least not necessary, to determine the useful life of property elements. It provides for a reserve, not to offset loss in usefulness or value but, rather, for the purpose of equalizing retirement costs. Even if equality existed in the amount of the reserves created under the two systems, a fundamental difference still exists, in that it is not required that the reserve be accumulated uniformly or through charges included wholly in operating expenses. . . . It will be seen that the

basic difference between Interstate and state systems relates to useful life, the first assuming that this can be determined with reasonable accuracy and that appropriations should be uniform, the second assuming that useful life is uncertain and that flexibility in appropriations is not only reasonable and proper for that reason but also for stability of income and maintenance of credit."

IN Mr. Nash's opinion, attempts to standardize useful life data of utility property have not been very successful. He says:

"The author has made careful studies of this subject based on a practical experience and contact with local public utilities for a period of more than thirty years. This experience does not include communication companies, which have materially different characteristics from other utilities and may justify different treatment. Based upon this experience, the author cannot subscribe to any theory implying a definite or even approximate knowledge of future usefulness of existing utility property. Changes and developments so far in the major groups of utilities have been both rapid and radical. Many substantial units thoroughly modern when installed have ceased to be useful when not more than one-third or even one-fourth of their expected useful life had expired. Other such units have survived far beyond the expected period of life although their actual usefulness has usually been curtailed. Many conscientious efforts have been made by groups of utility accountants or engineers representing national organizations to standardize useful life data. These efforts have uniformly failed because experienced participants have insisted that such efforts would be not only futile but misleading."

AFTER analyzing the various causes of retirement, Mr. Nash observes:

"The conclusion to be drawn from the foregoing analysis of useful life data is that time is only a minor factor among the causes of retirements, and that it should not be the sole or even a major basis of retirement appropriations. This being true, the straight-line depreciation accounting system lacks a logical basis for its support unless by some means the necessary errors in estimating the lives of various property elements may be used to counteract each other. It is generally true that the sum of a group of estimates is more accurate than the various components, and this is undoubtedly the case with utility useful lives. Such averaging is, however, permitted to only a limited extent in the Interstate system. Major items or groups of similar items have restricted reserves which may not borrow from or lend to each other, thereby nullifying a possible gain in accuracy.

"This disadvantage would be partially reduced by suggested revisions in the proposed Interstate system, which provides separate reserves only for each main group of fixed capital accounts, but the obstacle to real accuracy would still remain. It would still exist if a single composite reserve were permitted so long as it was based on a fixed percentage derived from weighted average life. The state system, as already mentioned, has one expense account or the alternative surplus as the source of the single reserve which makes for maximum accuracy regardless of the basis of charges."

OTHER characteristics of Federal and state systems of depreciation accounting are discussed and compared. The size of retirement reserves is a subject which has given rise to much discussion. It is a problem with which the Commissions from time to time have had to wrestle. As to the size of reserves Mr. Nash states:

"'The size of a suitable retirement reserve cannot be arbitrarily fixed within any such limits as above suggested. Under a depreciation reserve policy, with accumulations on a straight-line basis, the accrued depreciation is theoretically equal to the reserve, but this theory has not always been accepted in valuation cases. Our Federal Courts have repeatedly held that such a reserve, although supported by refined computations made at large expense, was merely an accounting record and not controlling in determining present fair value. Our regulatory Commissions, which are concerned with the equities of property rights rather than their confiscation, have given less attention to accrued depreciation in fixing the rate base than have the courts, but for the time being there is always the possibility in rate cases that in final adjudication substantial deductions may be made for accrued depreciation, even when investment is the starting point. Where, in the light of local regulatory history, such possibility exists, the utilities are justified in protecting themselves against it by creating reserves from their revenues sufficient for both retirements and designated accrued depreciation. It is not necessary that the two should be combined in accounting records. In fact, there is much logic in keeping separate retirement records for statistical purposes and analyses of adequacy, leaving the supplementary provision for accrued depreciation in the corporate surplus, which is the customary

source of unusual and contingent withdrawals.

"Up to the present time it has not been common practice among the regulatory Commissions definitely to limit retirement reserve accumulations. There have, however, been a number of cases, particularly in the telephone industry, where reserves have been accumulated on a straight-line basis, of criticism of what was believed to be excessive reserves. The amounts in question have sometimes been 30 per cent or more of the total investment. If such criticism continues and becomes more definite, the futility of refined computations based upon useful life of different elements and corresponding percentages applied to investments therein becomes apparent. At least one Commission has indicated that it would authorize the creation of a reserve amounting to 10 per cent of the rate base value of the property and would thereafter approve only sufficient appropriations to maintain such percentage. Such a limitation may provide suitable protection for a large, composite system, but would not be adequate for a property consisting of a few large or specialized units. Nor would it be safe in the absence of assurances that deductions for accrued depreciation would not be made in arriving at fair value.

"It has frequently been asserted that under the straight-line method of appropriations a mature, stable property would accumulate an unused reserve amounting to approximately 50 per cent of the total investment. Few utility properties are thus stable, that is, without growth, and because of growth, the accumulated reserve will actually be a smaller percentage. A few years ago the author made a mathematical analysis of retirement reserve accumulations under certain assumed conditions of uniformity of growth and characteristics of property elements. ('Public Utility Depreciation Accounting;' *The Journal of Land and Public Utility Economics*, October 1926.) The results of this analysis showed that the ultimate accumulation indefinitely maintained by such a property would be not far from 40 per cent of the total investment, being somewhat greater for properties of slow growth and less for properties of rapid growth. Departures from such percentages were shown to be not radically different for actual conditions instead of the assumed ideal conditions.

"Clearly, such reserves contributed by customers materially curtail the calls on the investing public for additional construction funds. If the major part of such reserves has no other practical use than as investment funds, it may be questioned whether the utilities are justified in forcing such investments from customers who might find investments of their own choosing more satisfactory or profitable."

ANOTHER controversy in the depreciation field has arisen over the question whether the annual depreciation charge should be based on the original cost or on the value of the company's property. Mr. Nash says that cost is prescribed by the standard accounting system but calls attention to the comparatively recent decision of the Maryland court of appeals sustaining the value theory. He then says:

"The Commission, while accepting the ruling of the highest court of its state as above indicated, has not been convinced of its equity and has appealed to the Supreme Court of the United States for review. A writ of certiorari has been granted and a final authoritative ruling on the matter is expected within a few months.

"While from an accounting point of view this decision may appear confusing, as a matter of fact it does not disturb fixed capital accounting because retired property may still be removed therefrom at its recorded value and the succeeding property entered at its actual cost. Although the ledger value may thereby continue to increase, the rate base value maintained in separate subsidiary accounts will not vary other than through changes in price level. The increase in cost and ledger value is provided for through the increased retirement appropriations and not from new capital.

"In any event, where a rate base differing from fixed capital account has been established by a Commission, a continuous record thereof should presumably be kept in order to maintain up-to-date values. The depreciation accounting program in question merely enlarges the purpose of this subsidiary valuation record, which, to be definitely useful, must, of course, be in sufficient detail to identify the value of each element to be retired."

MR. Nash makes the following suggestion as to financial advertising:

"One other situation in which accountants are interested should be mentioned. The financial statements published by many public utilities in connection with advertising of security issues and otherwise are commonly lacking in uniformity, particularly with respect to retirement or depreciation charges. Published income statements sometimes include such charges in operating expenses with or without desig-

nation of this fact and the amount; others insert them as deductions from income; and still others fail to designate any provisions for such purposes in their published statements.

"Unless the amount of depreciation charges, regardless of where they appear in the income statement, is known and the balance sheet shows the accumulated reserves, the advisability of investment in an advertised security cannot be clearly determined. The practice is growing in utility circles of an income statement setup in which the net income remaining after payment of operating expenses, taxes, and interest charges is added to the accumulated surplus, from which dividends and retirement appropriations are taken. This is a logical practice, at any rate where income is so subject to fluctuation that dividends or depreciation charges are not at times currently earned in full. So long as the state system of accounts permits and even encourages retirement appropriations from surplus, and this system continues in effect for the major part of the utility business, it would seem preferable to standardize published income statements accordingly."

CONCLUDING his comments on the Federal and state systems of depreciation accounting, Mr. Nash says:

"The two accounting systems discussed herein are alike to the extent that they seek to stabilize certain costs over a period of years. The costs in question are, however, quite different, one including only depreciation, the other embracing the overall cost of service, in which retirement charges are an important stabilizing factor. The reserves which both systems provide are usually quite different in size, but even if they were the same, the methods of accumulation are unlike, being uniform and flexible, respectively. This is the essential difference. Each system is open to objections in its operation. The Interstate depreciation system is based on assumption as to useful life which the outstanding executive and technical talent in the industry believes to be untenable now and to continue so until engineering and economic developments have become stabilized beyond present expectations. The state retirement system is vulnerable in its flexibility, which, without wise supervision, may be carried to unsafe extremes. But this defect can be remedied by some definite program of systematic flexibility such as is suggested herein. As between two systems with defects which are for the time being uncorrectible and correctible, respectively, the choice should be obvious."

—H. C. S.

DEPRECIATION ACCOUNTING METHODS FOR PUBLIC UTILITIES. By L. R. Nash, economist. New York: International Congress on Accounting, September 9–14, 1929.

The Clash of Authorities in the Making of Railroad Rates

THE first part of an article on "Conflict in Legislation Respecting Railroad Rates," by Kenneth F. Burgess, appears in the July issue of the *Harvard Business Review*.

The possible conflict to which the author refers is between the provisions of the Federal Transportation Act of 1920 and the Hoch-Smith Resolution approved five years later. The author describes certain standards of rate making as:

(1) The comparative standard;
(2) The cost of service standard;
(3) The value of the service to the shipper standard; and
(4) The economic, or depressed industry, standard.

Mr. Burgess says that prior to the Transportation Act of 1920, the administrative regulation of railroad rates had been based upon the comparative standard. Rates attacked as unreasonable or discriminatory were compared with other rates on the same or analogous commodities.

THE Transportation Act contained the familiar provision that the Interstate Commerce Commission should initiate freight rates so that carriers in such rate groups as it might designate would receive a fair return on the aggregate value of their property. The Hoch-Smith Resolution, he says, seemingly brings to the forefront other standards, cost of the service in respect to individual rates, and the value of the

service to the shipper, both as to the aggregate and individual rates as well as the so-called economic standard.

The author summarizes the provisions of the Hoch-Smith Resolution as follows:

"(1) The 'true policy' of rate making is announced. 'It is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.'

"(2) The Interstate Commerce Commission is directed to make a comprehensive investigation of freight rates in order to remove unreasonable, unjustly discriminatory, or preferential rates found to exist.

"(3) In making adjustments as a result of the general investigation, the Commission is directed to take into consideration among other factors, 'the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation.'

"(4) The Commission is specifically directed 'in view of the existing depression in agriculture' to effect 'with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.'

"(5) Pending rate cases shall be decided in conformity with the Resolution. This provision was designed to make the Resolution immediately effective and to insure results prior to the completion of the investigation called for."

THE cost of service standards has had much less effect on railroad rate making than is popularly thought. The author says:

"Even the most casual study of the cases wherein railroad companies sought the protection of the Fifth Amendment demonstrates that the railroads could not long have been maintained as successful transportation agencies if they had been compelled to rely for protection of their freight rate levels upon court decrees enjoining public authorities from requiring rates which definite and absolute proof would show were confiscatory. It was too easy for the courts to say that the carrier had not met the burden of proof which rested upon it of demonstrating by clear and convincing evidence that the rates under attack failed to provide a fair return upon the value of property employed in the specific service. Even the matter of delay alone in litigating such issues would have resulted in receiverships in the interim, or at least in a deterioration of the property through a failure to maintain it properly while the litigation was in progress."

It is the author's opinion that the value of the service standard is even less capable of measurement and definition than the cost of the service. His comment on this element of rate making is very illuminating. He says:

"Since no definite meaning has ever been ascribed to either of these terms—'the value of the service' or 'what the traffic will bear'—they are at best highly indefinite yardsticks. Probably they were merely convenient catch phrases employed to justify what appeals to the regulatory mind as being the desirable thing to do. They can not have any substantial basis for application except in so far as higher rates were made on higher valued commodities, or perhaps where restriction of freedom of movement is involved."

THE depressed-industry standard is one which has been mentioned in a number of cases, Federal and state. After pointing out that the Interstate Commerce Commission is directed by the Hoch-Smith Resolution to give attention to the conditions which at any given time prevail in our several industries, to the market value of the products, and to the development of the country, the author says in conclusion:

"The Supreme Court had theretofore held that freight rates could not lawfully be based upon the advantages or disadvantages of particular industries or localities which had nothing to do with transportation matters. The depressed condition of the lumber business was said to form no basis for reducing rates. Even where the form of order was so couched as to indicate superficially that its reasonableness had been determined under lawful standards, the court would examine the report and order of the Commission to ascertain the true basis of the latter. Finding that the order 'was based upon the belief by the Commission that it had the right under

the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate,' it was set aside. In the latter case, the court also declared that 'the law does not attempt to equalize opportunities among localities.'"

Whether Congress has the power to establish such a standard of rate making, however, in the opinion of the reviewer, remains to be seen.

—D. L.

Shall We Forbid, Compel, or Facilitate Railroad Consolidations?

WHAT shall be done about railroad consolidation? This is a troublesome problem.

Three major alternatives are possible in the opinion of Lewis C. Sorrell, Associate Professor of Transportation, University of Chicago. The public may forbid, compel, or simply facilitate consolidation.

To forbid it would be to go back to the situation prior to 1920. Such a policy is not justified because it is evident that some consolidations are in the public interest.

To compel consolidation requires much more evidence of the universal beneficence than we now have. Compulsion was proposed in 1920 and again in 1924 and rejected. Legal difficulties, too, would be very great.

The remaining alternative is facilitation. The public is willing to permit consolidation and to remove legal obstacles. The policy might go somewhat beyond this and offer incentives to consolidation. An example would be relief from recapture of excess earnings. But, though the public policy is favorable, it is not willing to tolerate any kind of consolidation. It emphasizes that voluntary consolidation must be in the public interest.

These opinions are expressed in the second of a series of articles on railroad consolidation in the July 13, 1929, issue of the *Traffic World* in which the purposes of the unification—consolidation sections of the Federal Transportation Act are discussed, the progress to date under these provisions treated of, and the various major problems considered.

It is easy to require that consolidation and unification may be in the public interest; but just what is the public interest upon this point? Professor Sorrell says:

> How shall the public interest be defined? The transportation act of 1920 attempted to meet that issue by requiring the Commission to formulate a plan of consolidation to which the carriers must conform. The wisdom of this is questioned. Professor Ripley thought it was desirable for the country to plan its future development and that railroad consolidation offered a good opportunity. Daniel Willard favors a consolidation plan. He only complains that delay in formulating a final plan handicaps the carriers in their own plans. But many other acute thinkers oppose the idea of a plan. They do not believe that any group of men have prescience enough to draw a plan for the indefinite future; that any such plan will be the product of current conditions; that, of necessity, it will be altogether too rigid and inflexible for these developing states. Hence, current thought turns to some other method of safeguarding the public interest. Enact legislation removing the legal disabilities in the way of consolidation. Leave the carriers free to formulate their own plans for consolidation, but require their submission to the Commission for approval. Let the Commission determine whether such plans accord with the public interest. Let Congress lay down a general formula concerning the public interest and let the Commission test individual cases according to this general formula. This procedure will resemble that in reasonable rate cases and in valuation proceedings. Definition of the public interest will not be easy, but proposed legislation before Congress offers the following formula.

In conclusion he says:

> It remains yet to be proved whether the end desired—namely, consolidations in the public interest—can be achieved by the method proposed—namely, voluntary action

on the part of the carriers. It must be obvious that end and means are not altogether reconcilable.

The theoretical benefits of consolidation are generally appreciated. The practical difficulties are very great, but they will probably be worked out in time. —J. T. C.

The Political Power of the Growing Army of Security Owners

Now that we have definitely accepted the principle of Government supervision over business activities, how are we to guard against the slow but remorseless growth of Government domination over business enterprise?

This interesting question was discussed by Edward N. Hurley, Chairman of the Board, Hurley Machine Company and former Chairman, Federal Trade Commission, War Chairman, United States Shipping Board, and member of Foreign Debt Commission, in an address delivered at the Institute of Public Affairs, University of Virginia, on August 12th.

Mr. Hurley said that history would certainly teach us that governments are not in habit of limiting their powers—at any rate not so long as the people they govern are gaining in numbers and prosperity. He believes that there might be cause for alarm at this situation were it not for one fact and that is that the evolution of the vast network of corporations which now do the bulk of American business is creating new social bonds among men, also altering the relations of government, politics, and business.

THE new owners of America are the millions of owners of corporation stocks and bonds in the United States. This is a new tool of democracy. The presidents of great corporations are alert to keep in touch with their stockholders in order that they may keep their hands upon the pulse of their opinion. He declares that the constructive relationship between the stockholders and the management is proof that the masses of the country are becoming the real governors, not merely the nominal, absentee owners of these institutions. He declares that it will no longer be possible for the mere political adventurer to attack the business enterprise of the country with impunity.

Mr. Hurley said, among other things:

> "In those times the professional 'corporation baiter' could rely upon the existence of a widespread delusion that business done by corporations was different from business done by individuals. It was not unusual then for some avaricious member of a state legislature to introduce an unfair bill designed to injure a successful company, a large part of which was owned by stockholders in his own district or state. Stockholders now have acquired a habit of writing to the presidents of the corporations and it will be just as easy to acquire a habit of writing to the state house if their investments are indirectly assailed. A statesman of today must be prepared to answer not merely criticisms of fellow politicians, of editors, and of people with a general interest in public questions. He must also be prepared to justify himself to large numbers of voters who have intimate knowledge of business and who have property rights involved in legislation. There is no question that this 'setup' is already powerful enough to minimize a great many destructive attacks on legitimate business. The stockholders of the country now have millions of votes, both in corporate and political elections. They are using that power to make their wishes respected. I think that the day of unreasonable attacks upon business is rapidly nearing an end. It is fortunate that this reassuring change coincides with the beginning of an era when the masses actually will own and control the larger corporations of the country."
>
> —M. S.

GOVERNMENT AND BUSINESS: An address delivered before the Institute of Public Affairs at the University of Virginia, August 12, 1929. By Edward Hurley.

OUT OF THE MAIL BAG

The Case of the Famous "Penny Carfare" in Glasgow

The Question

In the issue of Public Utilities Fortnightly of July 11, 1929, I read with a good deal of interest the article of J. B. M. Clark entitled "The Rise and Fall of the Penny Carfare."

In this article Mr. Clark says "the fares in Glasgow are graded from one cent upwards, according to the distance traveled. The 1-cent fare was introduced when the horse cars were taken over in 1894 and proved deservedly popular." Thereafter throughout the article he speaks of the fares as being 1, 2, 3, and 4 cents.

My understanding and recollection is that the Glasgow tramway minimum fare was and is one penny (English money) and not 1 cent. Of course, we all know that an English penny is equivalent to approximately 2 cents in American money, so that the article I would think is distinctly misleading.

Am I not right in my understanding that the minimum fare in Glasgow was and is a penny and not 1 cent?

G. Thomas Dunlop,
Washington, D. C.

The Answer

As a Glasgow man I can assure Mr. Dunlop that he need have no fear about accepting my figures for the fares, which I paid almost daily over a sufficiently long period of years to know at first hand. The minimum car fare in Glasgow from early days was, and still is, 1 cent as I stated, this half-penny fare being a famous feature of the system. Only in the post-war period was the 1-cent fare abolished (actually on two occasions I understand), and for a time 2 cents, or one English penny, became the minimum fare. However the 1-cent fare was finally reintroduced in July, 1927, and has remained in force ever since. If Mr. Dunlop happened to visit Glasgow during one of the periods when 2 cents was the minimum fare, this might account for his having the idea that 2 cents was the minimum charge.

In my article I predicted that the 1-cent fare was likely to be withdrawn a third time in the near future, but shortly after the article was written the Glasgow Town Council by a narrow majority (50 votes to 41) declined to accept the recommendation of the Tramways Manager and Tramways Committee to abolish the 1-cent fare, until the accounts for the financial year then closing were available. The latest on the subject, in the Glasgow *Weekly Herald* of June 30th last, is that the Tramways Sub-Committee on Finance, in view of the showing in the financial statement for the year ended May 31, 1929, has requested the manager to make further recommendations regarding the readjustment of fares.

This should clear up Mr. Dunlop's difficulty. Except for certain short periods the minimum car fare in Glasgow has been, and still is, 1 cent. What Mr. Dunlop may have found misleading is the reference in the title of the article to "penny carfare," but this title is an editorial embellishment for which I must disclaim responsibility.

Mr. Dunlop may be interested to know that the financial statement referred to above showed a deficit on the year's workings of $426,110, but the Chairman of the Committee stated in his remarks that in spite of this deficit the undertaking was really in a very sound financial position, that the surplus assets which had been applied to the sinking fund amounted to $21,153,630, and that the department was practically free of debt.

James B. M. Clark,
Montreal, Quebec, Canada.

Frank Discussions of Controversial Problems Are Beneficial

Permit me to say that in my opinion Public Utilities Fortnightly as recently edited and published constitutes a valuable periodical, especially instructive and informative for anyone interested in public utilities and public utility regulation.

The frank editorial discussion of current utility problems adds materially to the value of the periodical, and any plan extending the scope of the magazine along these lines should be very beneficial.

Richard T. Higgins,
Chairman, Connecticut Public Utilities Commission.

The March of Events

Alabama

Fight on Mobile Rate Differential Closed

THE hearings before the Commission on the fight of the city of Mobile against a differential of 20 per cent against direct current consumers, which proceeding also involved commercial and street lighting rate revisions, were ended before the Commission on September 20th. The Commission took the case under advisement.

Residential lighting and power rates had previously been reduced throughout the state and the Alabama Power Company insists that the reduction has impaired its revenues to such an extent that any further reduction should not be made at the present time.

City Commissioner Harry T. Hartwell, of Mobile, has been strenuously advocating the building and operation of a power plant by the municipality. His agitation for a city-owned plant does not seem to have borne fruit, if we are to rely upon a statement by City Attorney Vincent Kilborn in answer to a query propounded by associate Commissioner Frank P. Morgan. Mr. Kilborn is quoted as saying:

"I think the public generally (of Mobile) are fairly well satisfied with the residential rates. In fact, quite a few of them have expressed themselves as extremely well pleased. Personally, I am happy over my residential rate."

Arkansas

Electric Rates Reduced

MORE than $600,000 will be clipped from the electric bills of some 60,000 domestic and commercial customers of the Arkansas Power & Light Company in 170 communities, says the Little Rock *Gazette*, under new reduced rates approved by the board of directors of the power company. The new rates are to become effective January 1st.

The new schedules standardize rates for energy in all communities at 7 cents per kilowatt hour for the first six kilowatt hours per room and 5 cents per kilowatt hour for all in excess of six kilowatt hours per room, with special combination lighting-refrigerating-cooking rate, starting at 7 cents per kilowatt hour and dropping to as low as 2 cents per kilowatt hour. Commercial rates have a similar top—7 cents—scaling down to 2½ cents. Industrial rates are not affected, as these are as low as can be obtained for similar service under comparable conditions, according to H. C. Couch, president of the company.

The latest reductions have been made possible, Mr. Couch said, by construction and interconnection of large electric generating stations, by establishment of industries using electricity in large quantities, by economies of operations through consolidation of properties and business in different sections and standardization of methods, and by the adoption of the service charge plan, placing all customers on an equal basis.

California

Electric Rate Hearing Postponed

THE hearing before the Commission in regard to the electric rates of the Pacific Gas & Electric Company which was scheduled to open on October 1st has been continued one month, according to reports in the newspapers.

It is charged that the power company is earning excessive profits, which, if revised, would revert to consumers in savings of $4,300,000. Numerous city attorneys are seeking a reduction. Senator Herbert C. Jones is associated with the city attorneys.

Commission to Pass on Cities' Right to Buy Power

SEVERAL cities in California are asking the Commission to compel power companies to serve them with electricity at favorable rates for municipal distribution. The complainants completed the presentation of their case on September 28th and a postponement was ordered until November 12th, when the Pacific Gas & Electric Company and the Great Western Power Company will submit their defense.

Evidence was introduced to show that the Pacific Gas & Electric Company competed with the city of Lodi in the sale of electricity while it supplied the city with power. It is contended that the fact that the company supplied power to this city, thus selling to a competitor, furnishes a precedent. It is asserted that inasmuch as it sells to one competitor, it must under the law sell to all municipal competitors.

City Plant May Follow Company in Rate Cutting

MUNICIPAL electric rates in Los Angeles, says the Los Angeles *Herald,* may take another drop, following an announcement of a decrease in the schedules of the Southern California Edison Company in suburban sections expected to save patrons $1,400,000 annually. The manager of the department of water and power is studying the rates.

The reduction by the public utility was voluntarily made with the approval of the Commission. While the reduction applied only to electric light users, it has been announced that consideration is being given to possible lowering of industrial power rates. A lower rate recently made to the city must be taken into consideration in any rate adjustment.

District of Columbia

Merger Question Before Commission

A SESSION of the Commission on October 7th was set aside exclusively for consideration of the Commission's merger proposals, and officials of the Washington Railway & Electric Company and of the Capital Traction Company were on hand to be questioned. Hearings on the increased car fare proposals have been in progress since September 10th.

The authority of the Commission to go into the merger question is challenged by the street railway officials, who contend that the Commission has no authority to order a merger and must pass only upon the fare question. The Commission, however, takes the position that it has a right when investigating a request for fare increases to look into methods seeking to effect economies.

All briefs on behalf of the Washington Railway & Electric Company and the Capital Traction Company in the case are before the Commission, we are informed by the Washington *Herald.* These briefs, it was said, would be made public in detail.

President William F. Ham, of the Washington Railway & Electric Company, says the Washington *Times,* has attacked the merger and has asserted that it would be impossible to achieve financial stability for the proposed new traction company under the Commission's merger plan. Mr. Ham objects to a fixed valuation of properties which could be used as a basis for rate adjustments in the proposed plan.

Florida

Electric Rates Revised in St. Petersburg

A WHOLESALE revision of electric rates affecting every householder in St. Petersburg and its environs has been announced by the Florida Power Corporation, according to a report in the St. Petersburg *Times.* The new rates are to be based upon the number of "active rooms" in each house and, it is stated, will mean a reduction in cost for thousands of St. Petersburg people but an increase for others. A lower revenue for the power company is also indicated. The new rate schedules include a $5 service charge for consumers who use electricity less than six months a year, a $2.50 service charge for consumers who use it more than six months but less than twelve months, and a minimum

charge of $1 a month. The consumption rates range from 11 cents per kilowatt hour down to 3½ cents per kilowatt hour. Rules for room count are set for that length.

Georgia

Municipalities Organize to Secure Satisfactory Rates

THE Municipal Utilities Rate Association of Georgia held a meeting on September 26th, at which a constitution and by-laws were adopted and officers elected. Plans were laid for the employment of a rate expert to protect the interest of gas, electric power, and transportation users.

A fund of at least $25,000 is to be sought in order to meet the expenses of the organization. This is to come from dues to be assessed against members. Corporations, firms, and individuals interested in utility rates may be admitted to membership in the association, along with the cities, so that the organization may be representative of all consumers throughout the entire state.

The object of the association, as set forth in the constitution, is to obtain for its members reasonable public utility rates throughout the state of Georgia and to that end to furnish each member, when called upon, the services and counsel of a public utility rate expert within the territory named, and for the purpose of furnishing such information in the form of reports or otherwise so that reasonable and fair public utility rates may be ascertained, and if possible obtained.

An additional object will be to study the present laws of the state as compared with the laws of other states relative to public utility rates and to bring about suitable legislation that will enable the members of the association to obtain reasonable public utility rates.

Kansas

Commission to Pass On Right to Sell Gas in Wichita

A HEARING was scheduled before the Commission on October 22nd to pass upon the complaint by the Wichita Gas Company that the Wichison Gas Company had no right to sell gas in the city of Wichita without a permit from the Public Service Commission.

The city has granted permission to the Wichison Gas Company to sell domestic gas. This company contends that it is a one-city firm which does no domestic business outside of Wichita and, therefore, does not have to apply to the Commission for a permit. The Wichita Gas Company declares, however, that the Wichison Company is selling domestic gas illegally, and must cease doing this business.

Maine

Hearing on Androscoggin Electric Rates

HEARINGS in the rate case against the Androscoggin Electric Company were held by the Commission on September 25th in Auburn. Frank W. Winter, who headed a petition complaining that the rates of the company were discriminatory, made twenty-six demands upon utility records.

He included in these demands requests of law and advertising expense from January 1, 1928, to September 15, 1929, and a complete list of expenditures influencing the referendum election upon the power export bill. Attorney William B. Skelton, for the public utility, declared that none of the referendum expenses were charged against the Androscoggin Electric Company or the Central Maine Power Company and that they would not be reflected in the rates of consumers.

The attorney for the company, says the Portland *News*, declared that the defendant's case was based upon the proposition that the rates of the company were discriminating either because unjust or too high. Charges of unfair exchange of property between the Central Maine and the Androscoggin Electric Company or of too high a depreciation accrual, he insisted, should only be considered if the rate was shown to be exorbitant. He attempted to confine the hearing entirely to the question of rates.

One of the complaints is that the rates of customers using a small amount of current are many times those charged for those using larger amounts.

Maryland

Baltimore Fare Case in Supreme Court

THE long fight of the United Railways to force a 10-cent carfare in Baltimore was to be argued before the Supreme Court on October 28th, when counter appeals by the company and the Public Service Commission were to be heard.

The traction company, which lost its fight in the Maryland court of appeals to have the present fare schedule of four tokens for 35 cents declared confiscatory, went to the Supreme Court on that question. The Commission in a cross appeal asked the Supreme Court to set aside a ruling of the Maryland court of appeals permitting the company to base its annual depreciation allowance upon replacement value of its property instead of upon original cost.

The company contended before the Maryland court that it should have a fare sufficient to produce 7.5 to 8 per cent on its investment, but the court ruled that the present estimated return of 6.26 per cent was not necessarily confiscatory.

An attempt was made last year to secure a ruling from the Supreme Court, but the court refused to act because a rehearing on the depreciation issue ordered by the court of appeals had not been heard at that time.

Massachusetts

New Bedford Rate Case Before Commission

THE Commission, on October 1st, took under advisement the petition filed against the New Bedford Gas & Edison Light Company for lower electric rates. This case followed two reductions voluntarily effected by the company.

Commissioners commented, while estimates of the company were being given, relative to the value of the plant and charges which should be made for depreciation. There was some criticism of the high reproduction cost estimate presented by the public utility. One of the Commissioners took exception to the method used by utility experts in estimating depreciation costs.

Company representatives contended that the consumers had no ground whatever for complaint, that the rates were lower than in other cities.

Counsel for the petitioners argued that while the company had made two voluntary reductions this year and now has a rate of 6½ cents a kilowatt hour, its condition is such that a further reduction should be ordered. If the public is going to be called on to make up deficits of public service corporations during years of depression, he said, it is only fair to ask that the public be permitted to participate in some small measure in their years of prosperity.

Michigan

Annexation Results in Unequal Fares

AN attempt is being made in Royal Oak to obtain a straight 5-cent fare within the city limits on the Flint and Pontiac divisions of the Eastern Michigan Railway, according to a report in the Detroit *News*. Residents have complained that several rates of fare exist within the city limits, a situation brought about by the annexation of many sections to the city during the last two years.

Franchises and agreements held by the railroad call for 5-cent fares between certain parts of the city. A recent day-to-day agreement for the Flint division set a 5-cent fare from the southern limits to the Twelve Mile road. Annexation of Oak Ridge recently extended the northern boundary to the Fourteen Mile road. Residents north of the Twelve Mile road now pay 7 cents for a ride on the railway to the Royal Oak business section.

Missouri

Laclede Gas Rate Attacked in Court

THE appeal by the city of St. Louis from the order of the Commission made on January 15th in the Laclede Gas & Light Company Case came before Judge Henry Westhues in the Cole county circuit court on September 30th. The order granted authority to put in effect a new rate schedule increasing revenues annually by approximately $700,000.

The new rate schedules constituted a complete readjustment of the previous rates which had been in force for many years. It affects all classes of consumers and, it is said, increases the rates of small consumers while decreasing the rates of larger consumers. The company takes the position that a readjustment was necessary so as to apply to each rate step, or class of consumers, its proper and just proportion of the cost of producing the service.

Representatives of the city attack the allowance for depreciation, the operating expenses, the rate of return, and the valuation. The question of intercorporate relations is also involved. It is alleged that high gas prices are paid to an allied company.

New Hampshire

Assistance of Attorney General Invoked Under New Law

CITIZENS of the town of Rumney have requested the assistance of the attorney general in an attack upon the rates of the Pemigewasset Electric Company. This action is taken under a statute adopted this year providing for participation by the attorney general in rate proceedings.

Proposed new rate schedules, to become effective on October 1st, were suspended on September 30th by the Commission until January 1st, 1930. A hearing will be held before the Commission.

It is understood, says the Manchester *Union*, that the proposed new schedule is intended to equalize rates in the territory served by the company. The revised rates are, in some of the towns, higher than those now prevailing, while in other places they constitute a reduction. The company operates in Ashland, Ellsworth, Holderness, Plymouth, Rumney, Thornton, Warren, Wentworth, Campton, and Woodstock.

New Jersey

Utility Company Sues Cities for Water Charges

TESTIMONY was concluded on October 2nd in the suit of the Suburban Water Company to recover about $150,000 for water supplied to Kearny, Harrison, and East Newark. On October 15th arguments were to be heard by Vice Chancellor Backes. In the meantime briefs were to be submitted by counsel.

The suit is for the cost of about five years' supply figured at $16.50 per million gallons, a differential between $82.50, the tentative rate fixed by the court in 1924, and the $99 rate held by the Commission to be fair and reasonable. An expert for the company testified that the lowest rate which would insure a fair return on the company's investment would be $108. His method of computing the plant valuation and amortization of the capital was characterized by the defense as arbitrary.

North Carolina

Asheville Opposes New Phone Rates

A HEARING was scheduled before the Commission on October 15th on the petition of the Southern Bell Telephone Company for an increase in rates in Asheville. Mayor Gallatin Roberts, in behalf of the city, is resisting the increase.

The city bases its opposition on allegations that the telephone company's complaint of a low return of earnings is based mostly on wrong allocations and apportionments. The

city also insists that all of the present city of Asheville, with its new suburbs, be included in the present basic rate. Under the present system, sections outside of the old city limits have been forced to pay a slightly higher rate than those inside the limits.

The telephone company on May 22nd voluntarily made overtures to the city commissioners tantamount to a reduction in three classes of service. These offers were refused. The city countered by submitting a schedule of rates slightly higher than the present but not approaching the amounts asked by the company, and stated these rates would be considered on December 21, 1931. The company declined to consider the proposal.

Pennsylvania

Desk Telephones Suffer from Gay Parties

A DIFFERENTIAL charge of $3 a year for desk sets over the charge for wall sets in residences was the point of attack in a proceeding on October 2nd involving the rate schedules of the Johnstown Telephone Company. The attitude of Manager Edwin D. Schade, of the company, who appeared at the hearing as a witness, is reported in the Johnstown *Democrat* as follows:

"His explanatory testimony, given in Schade's brusque and frank style, became amusing in spots. The general manager of Johnstown's strong home-owned and independent telephone company said maintenance costs for desk sets are a good deal higher than for wall sets. Children play with the desk sets, bother 'central' with useless signals and baby calls, and knock the instruments about. Grown-ups also smash up the desk sets more easily than the fixed wall sets. Besides all that, desk sets, it appeared from the testimony, have a strong tendency to multiply and lengthen calls by the greater convenience of telephoning while sitting down comfortably than by standing up to the wall. Women, said Schade, snuggle a desk set into their laps and talk and talk and talk and talk —ad infinitum, ad nauseam. Sometimes, when a party is in progress, they spill liquids over the instruments and connections.

"Mr. Schade, to show his fairness in the wall set v. desk set controversy, told the Commissioner he did not have a desk set in his own home for the reason he had given. He also informed the Commission that business and industrial conditions in Johnstown are not so good at present, as he observed them, but that people see fancy desk sets in the movies and so are bitten by the desire to have them in their own homes."

Typhoid Suit Results in Rate Increase

A NEW water rate increase recently set by the Pittsburgh city council, says the Oakland *Post-Enquirer*, went into effect on October 1st. The plan was to assess against all water consumers an additional 25 cents no matter whether or not they used over the minimum amount.

This increase in rates was brought on by the entry of a judgment amounting to $50,000 against the city by reason of typhoid infection. In an effort to secure the necessary money, the council was forced to raise the water rates, and by that means spread the loss among water customers.

South Carolina

Long Distance Telephone Rate Revision Proposed

THE Southern Bell Telephone & Telegraph Company has proposed a revision of long distance tolls so as to make them conform with rates charged in other states. A hearing on the proposal was started before the Commission on October 2nd.

Thomas Crouch, district manager of the telephone company, the Greenville *News* tells us, has declared that the object is to provide rates that will come up to those of other states. There will be some increases and some reductions, he said. Present rates in South Carolina are said to be lower than those on long distance calls in Georgia and North Carolina. Mr. Crouch, in outlining the new plan, pointed out the following features:

"Toll rates for person-to-person calls from a distance of 12 miles to 128 miles would be increased from 5 to 15 cents, according to

the distance. Beyond 128 miles the rate would be reduced materially.

"There will be no increase in the charge for station-to-station calls for the first 30 miles. From 30 to 104 miles there will be a basic increase of 5 cents.

"A special 25 per cent reduction on station-to-station calls between 7 o'clock and 8:30 o'clock in the evening would be effective.

"A special evening rate between the hours of 7 and 8:30 o'clock is to become effective under the proposed revision."

There is considerable opposition by chambers of commerce and city representatives.

Tennessee

Power Utility Sold

ANNOUNCEMENT was made by Judge J. M. Anderson, attorney for the Tennessee Electric Power Company, at a hearing before the State Commission on October 7th, that his company had recently acquired the holdings of the Southern Cities Power Company, according to a report in the Nashville *Banner*. The Southern Company was protesting at the hearing against the application of the Franklin Power & Light Company for approval of its franchise for furnishing power and light to the town of Franklin and, because of the deal, the hearing was postponed.

The delay was agreed to by the attorney for the Franklin Company in order to give counsel for the Tennessee Electric Power Company time to look into the matter and ascertain just what his company desired to do in the controversy.

The franchise of the Southern Cities Company at Franklin expired on August 4th of this year and the city officials granted a franchise to the Franklin Power & Light Company. This is the franchise before the Commission for approval.

West Virginia

Hearings to Be Resumed in United Fuel Case

EXAMINATION of the books and valuation of the physical properties of the United Fuel Gas Company is expected to be completed soon, and, according to newspaper reports, the Commission is to resume hearing on the company's application for increased rates in Huntington, Charleston, and other West Virginia cities during the month of November.

Engineers for those protesting against the rate are making a complete valuation of the gas properties and accountants are making an examination of the company's books. The Huntington *Advertiser* reports that this is the first time that such a valuation has been made in the state by protestants to the company's several applications for an increase in rates.

The question is before the Commission whether the company should be required to furnish a bond to guarantee refunds to consumers in case a final decision is adverse to the public utility. Attorneys for the cities have requested such a bond.

Wisconsin

Milwaukee Street Car Fares

THERE is pending before the Commission a petition by the Electric Company, which renders street railway and electric service in Milwaukee, for a readjustment of car fares in the metropolitan area. A hearing on the petition was scheduled for October 15th.

Involved also in this case is a complaint by car riders in North Milwaukee against paying zone fares. This complaint is based upon the contention that a single fare should be in effect because of the annexation of North Milwaukee to the larger city.

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

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TITLES

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MISSOURI PUBLIC SERVICE COMMISSION.

MAPLEWOOD LAUNDRY et al.

v.

ST. LOUIS COUNTY WATER COMPANY.

[Case No. 6210.]

Discrimination — Promotional water rates — Large users.

1. A utility selling water to manufacturers using large quantities at a rate lower than that necessary to produce a full return on the investment, in order to promote business by influencing such manufacturers to locate in their district, thereby bringing in other classes of consumers paying for water at higher rates, is not discriminating where it does not appear that the rate is oppressive to other classes of consumers, p. 135.

Rates — Water — Manufacturer's classification — Laundry.

2. A laundry using large quantities of water is not entitled to a classification as a manufacturer for the purpose of obtaining reduced water rates, p. 135.

[June 14, 1929.]

PETITION of certain laundries for a lower rate; dismissed.

By the **Commission**: The Maplewood Laundry and the Overland Laundry Company are two separate corporations, operating as laundries in St. Louis county, receiving their water supply from the St. Louis County Water Company. These two corporations filed a complaint with the Commission asking that their business be classified as a manufacturer in order that they might receive water service from the St. Louis County Water Company under the schedule of rates, which said Water Company has on file with this Commission, known as its manufacturers' rate instead of under the Water Company's schedule of rates known as its commercial rate. The St. Louis County Water Company, hereinafter referred to as the Water Company, was notified of the filing of the complaint and was requested to give the matter attention. Shortly thereafter said Water Company made its answer, denying that the aforesaid laundry companies were entitled to such rate and asked that the complaint be dismissed.

This case was heard by the Commission, after due notice had been given, at the Commission's hearing room in Jefferson City on the 15th day of February, 1929, at which time and place all

interested parties were given an opportunity to be heard and the matter was submitted on the record.

At the hearing the Overland Laundry Company requested that it be authorized to amend the complaint by changing the name of the Overland Laundry Company to The Laundry, Inc. The request was granted and the complaint as it now stands before the Commission is that of the Maplewood Laundry and The Laundry, Inc., hereinafter referred to collectively as the complainants.

The evidence shows that the Maplewood Laundry is a Missouri corporation, located in the city of Maplewood with street address 7315-19 Manchester avenue, and that it is receiving water service from the Water Company under the rate schedule applying to commercial consumers who receive service in incorporated cities and towns in which the Water Company has franchises. In such towns the commercial rate was, at the time of the hearing of this cause, as follows:

Use in Gallons per Quarter	Per M.
0 to 3,000—first 3,000 gallons	48¾¢
3,000 to 9,000—next 6,000 gallons	45¢
9,000 to 36,000—next 27,000 gallons	37½¢
36,000 to 225,000—next 189,000 gallons	30¢
225,000 to 600,000—next 375,000 gallons	22½¢
All over 600,000	18¢

The Laundry, Inc., is located in an unincorporated part of St. Louis county with street address known as 2522 Woodson, and is furnished water service under a schedule of rates applying to the unincorporated districts of St. Louis county, such rates at the time of the hearing being as follows:

Use in Gallons per Quarter	Per M.
0 to 3,000—first 3,000 gallons	65¢
3,000 to 9,000—next 6,000 gallons	60¢
9,000 to 36,000—next 27,000 gallons	50¢
36,000 to 225,000—next 189,000 gallons	40¢
225,000 to 600,000—next 375,000 gallons	30¢
All over 600,000	20¢

These rates have been on file with the Commission since March 13, 1924. The Water Company's schedule also shows that it is furnishing water service in St. Louis county to manufacturers at a straight rate of 13½ cents per thousand gallons. Complainants claim that they are manufacturers and that they are entitled to service under the regular manufacturers' rate. No complaint is made against the other rates which the company has on file.

The complainants claim that they are in business similar to that of manufacturing because they collect together from various districts soiled fabrics and garments and, by the use of a large quantity of water, return such garments to their respective owners in a clean and refined condition suitable for human wear and use. The complainants further claim that it is untenable for the Water Company to make a distinction under its manufacturers' rate upon the basis of what the nature of the manufacturing is, what its product is, or upon any other distinction, excepting the quantity of water used. They state that to be sound, the basis of the classification cannot be whether the manufacturer makes one product or another any more than whether the consumer is negro or Caucasian, but must be based upon similarity of situation or condition with respect to the use of the water. To support their claim, the complainants cite State ex rel. Bradshaw v. Hedrick, 294 Mo. 21, l. c. 74, 241 S. W. 402, 420, in which the court said:

"The basis of sound legislative classification is similarity of situation or condition with respect to the feature which renders the law appropriate and applicable. A law may not include less than all who are similarly situated. If it does, it is special, and, therefore, invalid, because it omits a part of those which in the nature of things the reason of the law includes."

And in Ex parte French, 315 Mo. 75, 82, 285 S. W. 513, l. c. 515, the court said:

"A classification for legislative purposes must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . . . The legislature may not classify by characteristics or qualities, which might distinguish individuals, unless that distinction applies to the particular matter under discussion."

The complainants also state in their brief submitted in this case:

"In State ex rel. Attorney General v. Miller, 100 Mo. 439, 448, 13 S. W. 677, the court stated that in legislative classifications there must be distinctions between those coming within and those falling outside of the class included therein which must not only be substantial but it must be a substantial distinction, *hav-*

ing reference to the subject matter of the legislation between those embraced in the classification and those excluded."

The evidence shows that one of the complainants employs eighty-six persons regularly and that the other employs forty-three persons, a large part of whom reside in the district served by the defendant Water Company.

The Water Company testified that the rate of 13½ cents which it offers to manufacturers was put into effect to induce the Wagner Electric Company and the Fulton Iron Works to locate their plants in St. Louis county and take water from its system with the idea that the manufacturers would employ hundreds of men who would bring additional business to the Water Company which would be paid for at the highest part of the block of its schedule so that while there was no profit in the manufacturers' rate, the other business brought by reason of the location of the manufacturers' plants in the county and its territory would eventually make the offer of such rate profitable to the company. The Water Company further states that at the time it put into effect the manufacturers' rate, the rate did not pay, but the company hoped its business would come to a point that even though the rate produced no profit, it could at least be carried without a loss. The manufacturers' rate was put into effect prior to 1913. The Water Company further states that during the time it was trying to build up its business, following the establishment of the manufacturers' rate, the war came on and raised the cost of operation so that at no time has the sale of water at the net price of 13½ cents been profitable and, because of such condition, the company has been rather slow to extend its manufacturing rate or to call it an industrial rate for the purpose of including a broader class of customers. The Water Company claims that the cost of operation for furnishing water is in excess of 13½ cents per thousand gallons and that it was, at the time of this hearing, charging other customers, who take greater quantities of water than the complainants herein, according to the commercial schedule of rates set out above which was available to all classes of customers with the exception of manufacturers and some wholesale customers who paid a flat rate of 21½ cents per thousand gallons.

The evidence shows that the city of Webster Groves purchases its water supply at a wholesale rate, paying 21½ cents per thousand gallons straight, and that it purchases twenty-five times as much water as either of the complainants. The rate of 21½ cents was fixed by the Commission after formal investigation, and it is pointed out that that rate as a flat rate amounts to more than the average rate that The Laundry, Inc., pays under the schedule of rates now applying to the service furnished it, the average rate to The Laundry, Inc., being approximately 19½ cents per thousand gallons. The Overland Laundry pays a higher rate than The Laundry, Inc., it being in an unincorporated district and the rate being as set out hereinabove.

The Company testified that it was serving other institutions, one eleemosynary institution using about 25,000,000 gallons per month and for which a flat rate of 21½ cents per thousand gallons was paid. Other large consumers, as the St. Mary's Hospital, using more water than The Laundry, Inc., also pay 21½ cents per thousand gallons.

It appears that the company is serving some three or four classes of customers, one being the individual or commercial customers residing in incorporated cities and towns; another, commercial customers who reside in the unincorporated districts; another, that class of customers known as manufacturers; and the last, those customers who purchase water on a wholesale basis, the average rate being 21½ cents per thousand gallons, the last class of customers including such institutions as hospitals, city of Webster Groves, and eleemosynary institutions. The manufacturers' rate includes ten customers—the Wagner Electric Company, the Fulton Iron Works, the St. Louis County Gas Company, the Fayette R. Plumb Company, the Curtis Manufacturing Company, the Southern Manganese Steel Company, the St. Louis Frog & Switch Company, the Central Film Company, the Mazda Lamp Company, General Electric Company, and the Evans-Howard Fire Brick Company.

To determine whether or not the company's classifications that it now has of its customers are just requires consideration of the various conditions under which the company operates. It appears that the company instituted the rate of 13½ cents per thou-

sand gallons prior to the creation of this Commission in order to induce manufacturers to come into its territory with the hope that such manufacturers would bring other classes of consumers into its territory to be served and thereby build up its business and operate at a profit or greater profit. That desire instituted the 13½ cents rate applicable to manufacturers. Another classification was made by order of the Commission authorizing a flat rate of 21½ cents per thousand gallons to various customers who purchased water on a wholesale basis as described above. Then the company had another classification of customers, the individuals who resided in an incorporated city or town in which the company had a franchise to operate. The Water Company considered that it could offer a lower rate where it had a franchise because of the protection and assistance given in financing its business in such territory. Then, in the unincorporated districts it claimed that it should have a higher rate because of the lower load density in such districts and because of the relative greater difficulty to finance business that was to apply in unincorporated territory where no franchise had been granted.

Prior to the filing of the complaint in this case, the Commission had instituted an investigation of the Water Company's business; an audit, appraisal, and valuation of its property and business was being made at the time this complaint was filed. Since the filing of this complaint, the Commission has completed its audit and valuation of the property and issued an order requiring the company to reduce its rates some 12 per cent. The company has accepted the order and filed new schedules of rates which tend to reduce the discrimination claimed by the complainants herein. That reduction is brought about in the following manner. The rates authorized apply the major portion of the reduction to the blocks of water sold at the higher rates, the lower rates in the two general schedules receiving no reduction. The rates that it has been authorized to charge for water service furnished to the general public are as follows:

In Incorporated Cities and Towns

Use in Gallons per Quarter	Rate in Cents per 1,000 Gals.
0 to 9,000—first 9,000 gallons	37¢
From 9,000 to 99,000—next 90,000 gallons	30¢
From 99,000 to 489,000—next 390,000 gallons	24¢
All over 489,000	18¢

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In Unincorporated Districts

Use in Gallons per Quarter	Rate in Cents per 1,000 Gals.
0 to 9,000—first 9,000 gallons	50¢
From 9,000 to 99,000—next 90,000 gallons	40¢
From 99,000 to 489,000—next 390,000 gallons	30¢
All over 489,000	20¢

[1] The Water Company has also agreed to apply these schedules to those customers who have been buying water at a flat rate of 21½ cents, the result being a reduction in the charges for water furnished to all such customers. The company asked that no reduction be made in the 13½ cents rate under which water is offered to manufacturers. The Water Company contends that manufacturers have accepted that rate, bringing the company the benefits it had anticipated business would produce. It can be seen that the new rates as now charged by the Water Company reduce the differences between the rates charged the various classes of customers and also reduce any discrimination that might exist. The question now is whether or not the rates charged at the time the complaint was filed and those now in effect are unduly preferential. It does not appear that such condition has existed or now exists.

To promote its business the company has sold water at a rate lower than the rate necessary to produce a full return on the investment necessary to render such service, but it does not appear that selling it at the rate of 13½ cents has been oppressive to other classes of consumers. By securing manufacturers in that district, the company has brought in other classes of consumers who pay for the water at the higher rates and at the same time has developed the business generally in its territory.

[2] The question of whether a laundry is a manufacturing establishment or falls in the classification of manufacturers has often been before the courts, and it has been uniformly held that a laundry is not a manufacturing establishment and does not fall within the provisions of statutes affecting manufacturers. In State ex rel. Moose v. Frank, 114 Ark. 47, 169 S. W. 333, 335, the court said:

"The question has several times been before the courts of various states as to whether a laundry was a manufacturing establishment or not, and so far as we are advised it has been uniformly held that it is not."

Other cases to the same effect are Muir v. Samuels, 110 Ky. 605, 62 S. W. 481; Downing v. Lewis, 56 Neb. 386, 76 N. W. 900; Re White Star Laundry Co. 117 Fed. 570; and Commonwealth v. Keystone Laundry Co. 203 Pa. 289, 52 Atl. 326.

After considering all the evidence in the case, and the rates that the Water Company now has on file, the Commission is of the opinion that the complainants herein are not entitled to be classified as manufacturers and that the complaint should be dismissed.

It is, therefore,

Ordered: 1. That the complaint of The Laundry, Inc., and the Maplewood Laundry against the St. Louis County Water Company be and the same is hereby dismissed.

Ordered: 2. That this order shall take effect ten days after this date and that the Secretary of this Commission shall forthwith serve certified copy of this report and order on all interested parties, and that the interested parties herein shall, on or before the effective date of this order, notify the Commission whether the terms of this order are accepted and will be obeyed.

Stahl, Chairman, Ing and Hutchison, Commissioners, concur; Porter and Hull, Commissioners, absent.

MAINE PUBLIC UTILITIES COMMISSION.

RE EASTPORT WATER COMPANY et al.

[U-1046-U-1060.]

Consolidation, merger, and sale — Difference between consolidation and merger.

1. The process by which several corporations are combined in one is a consolidation which usually results in a dissolution of the constituent companies and the formation of a new corporation, whereas a merger exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constitutent companies, p. 149.

Security issues — Legal obligations — Holding companies.

2. It is inconsistent with the spirit of a law prohibiting utilities from dealing in the stocks of other utilities without approval of the

Commission to permit a holding company, after negotiating such business without the approval of the Commission, immediately or shortly after to be recognized as a public utility and treated as such in consolidation proceedings, p. 151.

Security issues — Activity of holding companies.

3. A holding company may lawfully negotiate the stocks of public utilities without the approval of the Commission since it is not itself a public utility, p. 152.

Consolidation, merger, and sale — Size of utility — Water companies.

4. Size alone of a utility which will result from a consolidation is no valid reason why it should be condemned, nor should the fact that it is looked upon as profitable by its promoters make it objectionable, provided corresponding advantages result or it appears there will be no disadvantage to the public service on account of the proposal, p. 154.

Consolidation — Objections — Water companies.

5. The supply and service of water is a peculiarly localized function and a consolidation of widely separated companies is not susceptible to the economic advantages usually accruing to such coalitions to that degree experienced by other forms of utilities such as electric companies more dependent upon mutual relationship, p. 155.

Consolidations — Public interest.

6. Before the Commission approves of a consolidation of utilities it should be made to appear that the proposal is in the interest of public welfare or will to some extent serve public interest; otherwise such petition should be denied, p. 155.

Security issues — Blanket mortgages — Objections to consolidation.

7. A proposed financial plan for consolidation of water companies making possible the placing of a blanket mortgage on fifteen widely scattered water utilities was held not to be in accord with sound public policy in the management of water utilities and likely in times of financial stress to hamper and embarrass the component utilities in their service to the public, p. 158.

[June 11, 1929.]

PETITION for consolidation by means of conveyance of properties, franchises, and permits by fifteen water companies; denied.

Appearances: Hon. William B. Skelton, and Charles M. Storay, for petitioners; Hon. Charles E. Gurney, for city of Eastport and town of Presque Isle; Hon. Herbert W. Kitchen, for town of Presque Isle; John B. Williams, for towns of Sangerville and Guilford; E. L. Deane, for town of Greenville; Hon. Bertrand C. McIntire and L. F. Pike, for Norway Board of Trade; John Needham, for town of Orono; Charles J. Hutchings, for city of Brewer.

By the **Commission**: The subject matter of this inquiry was initiated on January 17, 1929, when there was filed with this Commission a separate petition by each of fifteen individual and distinct water companies, hereinafter called the Petitioning Companies, asking for authority to consolidate their several properties and franchises with the Maine State Water & Electric Companies, a corporation organized under the General Laws of the state of Maine, and having its principal office at Lewiston in the county of Androscoggin. The Petitioning Companies are as follows:

Eastport Water Company, Greenville Water Company, Guilford Water Company, Hartland Water Company, Mars Hill & Blaine Water Company, Mechanic Falls Water Company, North Berwick Water Company, Norway Water Company, Penobscot County Water Company, Presque Isle Water Company, Sangerville Water Supply Company, Skowhegan Water Company, Southwest Harbor Water Company, Stockton Springs Water Company, and Waldoboro Water Company.

The petitions uniformly state:

". . . said Maine State Water & Electric Companies is authorized by its charter to construct, purchase, own, deal in and/or operate plants and properties for supplying water for domestic, commercial, sanitary, fire protection, and municipal purposes and intends to exercise said powers whereupon it will become a public utility subject to the jurisdiction of the Commission. And said Maine State Water & Electric Companies is well equipped and able to furnish said service as a water company, as defined in Chapter 55 of the Revised Statutes of Maine, in and to the several communities in and to which this petitioner is so rendering service and authorized so to render service."

They also set forth the corporate organization of each company, the territory which each is authorized to serve, the action of stockholders in voting to consolidate, the consideration to be paid for said properties and franchises, and the terms of payment.

Coincident with the filing of said petitions, there was also filed with us an application by said Maine State Water & Elec-

tric Companies (U–1061) for authority to issue securities, wherein it was set forth that said Maine State Water & Electric Companies is a *"public utility* organized under the General Laws of the state of Maine on October 23, 1928 . . . and that it is at present engaged in the business of *owning shares of capital stock* and other securities, but proposes to furnish its water service in numerous towns and cities in the state at the time of the issue of the securities hereinafter mentioned."

That L. C. Chase of Boston, Massachusetts, is president of the company, R. W. Gilbert, also of Boston, is treasurer. H. N. Skelton of Lewiston, Maine, is clerk, and that Linwood C. Chase, Royce W. Gilbert, and Kinsley van R. Dey, all of Boston, are directors.

Authority of the Commission is requested in said application to issue 7,150 shares of $6.50 preferred stock of no par value, 50,000 shares of nonpar common stock, and first and refunding 5 per cent 15-year gold bonds, dated as of February 1, 1929, in the aggregate principal amount of $2,000,000, with authority to place a mortgage upon the assets and property of the company to secure the issue of the aforesaid bonds. It is further stated in said application that the aforesaid stocks were already actually issued and that approval thereof is now being asked for only if the Commission deems that it has jurisdiction in the premises. The purposes for which said securities are requested to be issued appear in said application to be as follows:

1. To provide funds with which to pay for the properties, franchises, and permits of said fifteen water companies, subject to outstanding bonds;

2. For acquiring the securities of five other companies, viz.: Dennistown Power Company, Limestone Water & Sewer Company, Livermore Falls Light & Power Company, Sanford Water Company, and Turner Light & Power Company;

3. For the payment of its lawful indebtedness;

4. For providing adequate working capital;

5. To reimburse its treasury for moneys expended in the acquisition of properties, plants, and other assets used and useful in its business.

Notice of hearing on each of the petitions and on the applica-

tion of Maine State Water & Electric Companies for authority to issue securities was widely circulated in newspapers as well as served in the usual manner, and as provided by law upon all parties in interest, and the case came on to be heard in accordance with said notice at the offices of the Commission in Augusta on January 29, 1929. The petitioners as well as some of the communities where certain of the water companies involved are located, were represented by able counsel and in some instances by citizens and representatives whose appearances were duly entered upon our records. At the conclusion of the testimony, and after a very full presentation of the evidence in the case, a continuance was granted on request of parties and upon motion of counsel, in order to furnish an opportunity for an examination of the testimony and evidence already presented, for filing briefs, and for oral arguments to be heard by the Commission at a continued hearing to be held upon some subsequent date to be determined by the Commission, which was later fixed for March 20, 1929, at which time Honorable William B. Skelton for the petitioners and applicant for securities, and Honorable Charles E. Gurney, in behalf of the opposition, each presented able and illuminating arguments, including citations of authorities.

It appears from the evidence that the Petitioning Companies were, with rare exceptions, organized by special act of the legislature to furnish water service in the communities generally indicated by the name of the company, as for example, Eastport Water Company, chartered to serve the city of Eastport, and Greenville Water Company, chartered to serve the village of Greenville. The following is a list of all the companies with manner and date of organization:

Organization.

Eastport Water Company, Ch. 22, P. & S.[1] 1887; Greenville Water Company, General Law 1904;[2] Guilford Water Company, Ch. 226, P. & S.[1] 1909; Hartland Water Company, Ch. 282, P. & S.[1] 1911; Mars Hill & Blaine Water Company, General Law 1911; Mechanic Falls Water Company, Ch. 259, P. &

[1] Private and Special.
[2] Ratified by Ch. 244 of Private and Special Laws, 1905.

S.[1] 1891; North Berwick Water Company, Ch. 186, P. & S.[1] 1895; Norway Water Company, Ch. 369, P. & S.[1] 1885; Penobscot County Water Company, General Law 1922;[2] Presque Isle Water Company, Ch. 3, P. & S.[1] 1887; Sangerville Water Supply Company, General Law 1910; Skowhegan Water Company, Ch. 44, P. & S.[1] 1887; Southwest Harbor Water Company, Ch. 390, P. & S.[1] 1893; Stockton Springs Water Company, Ch. 107, P. & S.[1] 1905; Waldoboro Water Company, Ch. 417, P. & S.[1] 1907.

The following blue print showing the location of these companies upon an outline map of the state of Maine with interconnecting highways and their mileage delineated thereon, is helpful in visualizing the long distances which separate them, all of which will be further commented upon later in this decision. [Blue print omitted.]

It will be noted that the application of the Maine State Water & Electric Companies for authority to issue securities filed in connection with these proceedings stated that this company was a public utility organized under the General Laws of this state, but it was also stated and the evidence shows that it had never engaged in any business except that of "owning shares of capital stock and other securities" in other corporations and that it is, therefore, not a public utility at all, but is a holding company and nothing more, although authorized under its charter to transact business either as a holding company or as a public utility or both.

For the sake of brevity we shall hereinafter refer to this company as the Holding Company and when such designation is applied it will be understood to mean the Maine State Water & Electric Companies.

In order that the broad purposes for which this company was organized may fully appear, although somewhat lengthy, it may be well to set them forth as shown by its certificate of incorporation, a copy of which is on file in this case.

[1] Private and Special.
[2] Ratified by Ch. 57 of Private and Special Laws, 1923.

Maine State Water & Electric Companies Purposes.

"To construct, purchase, own, deal in and/or operate plants and properties for supplying water for domestic, commercial, sanitary, fire protection, and municipal purposes;

Without limitation by or of the foregoing, to acquire in any lawful manner, own, hold, sell, or otherwise dispose of, and generally to deal in, with all of the rights, privileges, and immunities that natural persons could or would possess and enjoy in the premises, any shares of capital stock, bonds, notes, or other obligations or evidences of indebtedness, and securities of any kind whatever, issued by any corporation, association, joint stock company, firm, partnership, or individual, one or any number, for whatever purpose organized and in whatever business engaged, and/or real or personal property, rights, credits, franchises, privileges and easements of every description;

To aid in any manner the issuer of stocks, bonds, notes, or other evidences of indebtedness and securities of any kind held by this corporation, and to do any and all lawful acts and things designed to protect, preserve, promote, and enhance or improve the value of any stocks, bonds, notes, or other evidences of indebtedness, or securities, or the value of the property of any corporation, association, joint stock company, firm, partnership, or individual, any of whose stocks, bonds, or other securities this corporation may hold;

To enter into, execute, and carry out contracts for any lawful purpose whatever;

Generally, in furtherance of any of the foregoing, and without limitation hereof or thereof, to assume, underwrite, or otherwise guarantee the obligations of others; to issue and deal in its stocks, bonds, debentures and other obligations, and to purchase, acquire, reissue, and otherwise treat the same in any lawful manner; to use, pledge, and hypothecate its funds, assets, and credit; to possess and exercise through and in respect of the foregoing every power which natural persons might possess and execute in respect thereof, and every power necessary and appropriate for or incidental to the full accomplishment of each and every of the foregoing purposes.

The foregoing clauses shall be construed both as objects and powers, and no recitation, expression or declaration of specific or special powers or purposes herein enumerated shall be deemed to be exclusive, but it is hereby expressly declared that all other lawful powers not inconsistent therewith are hereby included; provided, however, that nothing herein contained shall be construed to authorize this corporation to exercise any powers in any other state, district or country contrary to the laws thereof, nor in this state in violation of the provisions of law relating to the organization of corporations under the general laws of the state; but this corporation may exercise any of its powers in any state, district, or country where it is lawful for it so to do."

At the hearing it was shown that this company neither owned nor operated any company engaged in any public utility business and that its activities as a holding company had been directed entirely by Linwood C. Chase and Roger W. Gilbert, both of the firm of Chase and Gilbert, Incorporated, Boston, and Kinsley van R. Dey, formerly connected with Spencer Trask & Company, Boston, who since January 1st of this year has been devoting his entire time and attention to its affairs in promoting its financial interests; that Chase and Gilbert, Incorporated, is connected with the Atlantic Public Service Corporation, another holding company with principal offices at Boston, engaged in the business of holding stock ownership in water, light, ice, and other kindred companies, scattered throughout numerous states of the Union, including Maine, New Hampshire, Massachusetts, Pennsylvania, West Virginia, Kentucky, and possibly some others; that this firm of Chase & Gilbert, Incorporated, and Mr. Dey are now either directly or through the organizations with which they are connected, engaged generally in the investigation, acquisition, and operation of a variety of public utilities such as just mentioned, covering a wide field of activity as above indicated. It also appears that the operations of these financiers as directed toward the state of Maine, which have culminated in these proceedings, had their inception in the purchase of the capital stock of the so-called "Taylor Companies" made in March, 1928, which stock was in turn later transferred to the

Holding Company. These "Taylor Companies" are included among the petitioning companies and are as follows:

Taylor Group.

Guilford Water Company; Hartland Water Company; Mars Hill & Blaine Water Company; Presque Isle Water Company; Sangerville Water Supply Company; Stockton Springs Water Company.

They derive their designation from the name of the promoter and builder, Mr. Charles N. Taylor, late of Wellesley, Massachusetts, now deceased, who, some fifteen or twenty years ago, constructed a group of water plants and systems situated in various sections of this state, in villages and towns not then served by a public water supply.

It is contended, and we think quite generally conceded with some evidence on file to support this contention, that these Taylor Companies especially were originally financed on the proceeds of bonds floated at the time of construction and that in most instances the stock issued then and since represents very little, if any, real value, which further analyzed in the light of evidence on file with the Commission would mean that the actual original investment cost would generally not greatly exceed 50 per cent of the capital account as set up and carried on the books of the company. The same would be true to a certain degree of at least some of the other petitioning companies. This feature, however, is not an essential or deciding factor in this case and is referred to more as a part of the background and incidentally as throwing some light upon the position of the proponents of this enterprise.

In certain instances this Commission has heretofore been called upon to consider the question of valuations of some of these same companies and as an example of how some of them compare with valuations presented in this cause, let us take the cases of Presque Isle Water Company and Hartland Water Company.

Presque Isle Water Company.

In F. C. 227, hearing April 14, 1920, P.U.R.1920C, 976, involving *rates and service* the Commission found

Fixed capital as of July 1, 1915	$125,937.58
Additions to December 31, 1927	13,755.30
	$139,692.88
Other additions to December 31, 1928	16,038.86
Total at December 31, 1928	$155,731.74
Stone & Webster appraisal in the instant case	252,529.36
Valuation exceeds investment, December 31, 1928	$96,797.62

The book value as reported December 31, 1928, is $220,721.-73, resulting in a difference of $64,989.99 between the Commission's finding and the book figure carried by the company.

The examination of the affairs of the company in connection with this case disclosed that the original property was apparently created from proceeds of bonds to the amount of $81,000 and that there was received from sale of $94,750 par value of stock $32,792.75.

Hartland Water Company.

In F. C. 299, hearing December 20, 1920, involving a rate case, the evidence in the case discloses that the original cost of the property up to December 31, 1919, was

	$72,190.01
Subsequent additions to December 31, 1928	2,562.15
Actual investment to December 31, 1928	$74,752.16
This figure contains bond discount of	5,310.00
Net cost to December 31, 1928	$69,442.16
Stone & Webster valuation, reproduction cost less depreciation in the instant case	170,873.59
Valuation exceeds investment	$101,431.43

The securities of the Hartland Water Company outstanding are

Preferred stock	$9,000
Common stock	52,600
Bonds	50,000
	$111,600

From the above figures it is apparent that the property of this company was created largely from the proceeds of bonds and preferred stock.

These examples serve only to show the financial set up of

these Taylor Companies, and illustrate in some degree the relation which the price paid for these properties by the holding company bears to the original investment cost of plant.

After acquiring the stock of the "Taylor" properties, as a nucleus in March, 1928, it seems that Chase & Gilbert, Incorporated, then proceeded to purchase the stock of the other Petitioning Companies and a controlling interest in the five additional companies heretofore enumerated, which are not included in the proposed consolidation, the securities of which are to be put up as collateral to support the security issue requested by the Holding Company under its application.

This stock was all taken over by the Holding Company after its organization in October 1928, and financed by temporary loans through Atlantic-Merrill Oldham Corporation of Boston and with the State Street Trust Company, also of Boston, the former being a financing corporation connected with the Atlantic National Bank of Boston, the amount of which loans as shown by Appendix I of application for approval of securities appears to be the sum of $2,063,726.05.

This Holding Company also proceeded to issue 50,000 shares of nonpar common stock and 7,150 shares of $6.50 preferred stock of no par value and executed a 5 per cent bond in the principal amount of $1,950,000 dated December 1, 1928, due December 1, 1953, which it pledged as additional collateral for temporary loans above referred to, all of which is stated in said application but not very definitely shown in evidence, since the only witness called on this phase of the case, A. Homer Hathaway of Boston, assistant treasurer of the company, testified that he was not personally cognizant of the transactions regarding the temporary loans.

These securities were all issued without coming to this Commission for authority, since as a holding company it claims that there is no requirement under our law that Commission approval of its securities issues must be obtained.

It is further the claim of the Holding Company, as presented through its counsel, that this stock issue does not need to be ratified by this Commission in the event of its becoming a pub-

lic utility, and doubt is expressed whether the Commission has any jurisdiction to ratify it, since it has already been issued. Counsel further quite frankly states:

"It was not intended at first to ask you to ratify it, but in order that there might not be even the appearance of any concealment or any withholding from your attention we put in the petition itself, before we filed it with you, a schedule of the stock we had issued and had a right to issue and we have said:

'The aforesaid stocks were actually issued before your petitioner became a public utility and approval thereof is now asked for only if the Commission deems that it has jurisdiction in the premises.' "

This case was elaborately prepared with commendable skill and considerable ingenuity. The firm of Stone & Webster of Boston was employed by Chase & Gilbert, Incorporated, in behalf of the petitioners as engineers to make an appraisal of these several properties in preparation for the hearing, and extensive tabulations were presented and introduced in evidence as exhibits. It appeared in testimony that no representative of this firm of engineers had ever visited some of the plants included in their appraisal and had never even seen the city or town where some of them were located, but that they had built up their tabulation entirely from information gleaned from the books and accounts of the companies which had been made available to them by their employers, *viz.* Chase & Gilbert, Incorporated. Other tabulations, reports, and balance sheets were introduced in evidence as exhibits and testified to by an accountant from New York city, representing the firm of Barrows, Wade, Luther & Company, including a field audit made from the books of the several companies, showing revenues, expenses, fixed capital, etc. Mr. Hathaway, to whom reference has already been made as a representative of the firm of Chase & Gilbert, Incorporated, and an officer of the Holding Company, testified as to price paid for the stock of the various companies.

It seems unnecessary for the purposes of this decision to recite these figures more in detail than may be shown by the following condensed statement taken from the mass of evidence

presented and exhibits introduced in the case, which is sufficient for purposes of comparison.

Company.	Cost or Purchase Price.	Investment Book Value Dec. 31, 1928.	Stone & Webster Appraisal Reproduction Cost Less Depreciation.
Penobscot County Water Co.	$620,760.00	$751,886.34	$1,219,400.00
Eastport Water Co.	181,100.00	255,496.24	408,300.00
Greenville Water Co.	112,750.00	127,229.73	159,200.00
Southwest Harbor Water Co. ..	58,492.00	75,120.97	78,700.00
Skowhegan Water Co.	139,114.32	186,945.63	288,500.00
*Guilford Water Co.	116,547.00	139,186.44	141,022.52
*Sangerville Water Co.	32,209.00	32,705.02	39,160.00
*Hartland Water Co.	83,202.02	128,140.95	170,873.59
*Stockton Springs Water Co. ..	77,131.31	134,705.36	229,176.21
Mechanic Falls Water Co.	84,796.71	82,713.94	148,600.00
North Berwick Water Co.	57,718.75	51,344.31	106,700.00
Norway Water Co.	124,060.17	103,455.22	126,200.00
Waldoboro Water Co.	31,700.00	29,200.79	64,600.00
*Mars Hill & Blaine Water Co.	80,025.00	102,289.56	125,576.70
*Presque Isle Water Co.	177,720.50	220,721.73	252,529.36
	$1,977,326.78	$2,421,142.23	$3,558,538.38

* Taylor Companies.
(The appraisals of the Taylor Companies have no allowance for depreciation.)

The following is a similar statement regarding the five other companies, the majority of the stock of which has been acquired by the Holding Company, but which are not proposed for consolidation at this time.

Company.	Capital Stock o/s Date of Acquisition and Bonds Assumed.	Investment Book Value.	Appraisal Reproduction Less Depreciation 8/1/28.
Sanford Water Co. Nov. 30, 1928	$100,000.00	$300,549.17	$527,400.00
Turner Light & Power Co. Nov. 30, 1928	43,500.00	75,919.57	110,700.00
Dennistown Power Co. June 30, 1928	None	75,132.63	134,800.00
Limestone Water and Sewer Co. June 30, 1928	43,000.00	48,366.61	63,900.00
Livermore Falls Light & Power Co. June 30, 1928	130,000.00	182,765.21	157,700.00 (10/1/28)
	$316,500.00	$682,733.19	$994,500.00

We will not undertake to discuss to any extent the significance of these figures, which very largely speak for themselves, but in passing may say that while it is true the question of rates is not now before us, nevertheless it is quite obvious that the pro-

moters of this enterprise have not overlooked the possibilities in this connection, as strongly indicated in the preparation and presentation of this case. There was a large mass of evidence presented in support of the reproduction cost less depreciation as testified to by the Stone & Webster engineers, and much stress was laid upon these figures for the purposes of demonstrating to the Commission the reasonableness of the request of the Holding Company for securities with which to finance the proposed merger, along the lines indicated in its application, from the midst of which the spectre of increased rates seemed almost constantly to arise.

[1] The process by which it is sought to combine these several corporations into one has been generally referred to as "consolidation" proceedings; the evidence shows that the stockholders voted to "merge and consolidate with Maine State Water & Electric Companies;" counsel on both sides have frequently used the terms "merge" and "merger" throughout their discussion of the case, and our statute uses the expression "merge or consolidate."

The consolidation of corporations, strictly speaking, contemplates and results in a dissolution of the constituent companies and the formation of a new corporation. Scheidel Coil Co. v. Rose, 242 Ill. 484, 90 N. E. 221.

A merger is generally said to exist where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent corporations. Such a merger, however, is often properly termed a consolidation. These proceedings do not seem to us to fall within the strict rule either of merger or consolidation, although partaking to some extent of the essential elements of both. Re Bangor R. & Electric Co. (Me.) P.U.R.1925E, 705.

Courts have sometimes held, however, that the results of consolidation are somewhat dependent upon the wording of the statute, and that as a general rule consolidation dissolves the original corporation involved and creates a new one, but if the legislature simply authorizes consolidation the general rule applies. Chicago Title & Trust Co. v. Doyle, 259 Ill. 489, 102 N. E. 790.

The express provisions of the statute under which we are proceeding and to which this Commission must look for its authority in passing upon the prayer of these petitioners, is § 40 of Chapter 55 of the Revised Statutes, which reads as follows:

"Any public utility may henceforth sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its property necessary or useful in the performance of its duties to the public, or any franchise or permit, or any right thereunder, or by any means whatsoever, direct or indirect, merge or consolidate its property, franchises, or permits, or any part thereof, with any other public utility, when, and not otherwise, it shall have first secured from the Commission an order authorizing it so to do."

What may a public utility do under the provisions of this statute? It seems quite plain that it may "sell, lease, assign, mortgage . . . direct or indirect, merge, or consolidate its property . . . with any other *public utility,* when, and not otherwise, it shall have first secured from the Commission an order authorizing it so to do."

A corporation must have statutory authority for any consolidation, purchase, or merger by which it acquires the property or franchises of another. Chicago Title & Trust Co. v. Doyle, *supra.*

This Commission possesses no authority other than that vested in it by the statute. Cincinnati v. Public Utilities Commission, 96 Ohio St. 270, 117 N. E. 381.

As has already been shown, the Maine State Water & Electric Companies with which the Petitioning Companies ask to be consolidated is not a public utility. It neither owns nor operates any physical properties dedicated to the public service. While it has a very broad charter, which gives it a right to engage in a public utility business, it has never done so and is at present admittedly a holding company and nothing more, owning and/or controlling the securities of the twenty corporations hereinbefore mentioned.

This holding company, which seeks by these consolidation proceedings to take over all these other companies and then by our order to become a public utility, proceeded as has been shown

in evidence, as soon as it was organized, or shortly thereafter, to do that which it had a right to do as a holding company but what it could not have done had it been a public utility, *viz.;* to purchase the capital stock of utilities and issue its securities for the purpose of obtaining necessary funds therefor without Commission authority.

[2] Said § 40 of Chapter 55 of the Revised Statutes, a portion of which has already been quoted providing for consolidation, further ordains:

"No public utility shall hereafter purchase or acquire, take or hold any part of the capital stock of any other public utility organized or existing under or by virtue of the laws of this state without having been first authorized to do so by the Commission."

Section 37 of Chapter 55 provides:

"Any public utility . . . may issue stocks, bonds . . . notes or other evidences of indebtedness . . . provided and not otherwise . . . there shall have been secured from the Commission an order authorizing such issue. . . ."

It seems utterly inconsistent with the spirit of the law, if not an evasion of its express provisions, that as a holding company it may purchase the capital stock of fifteen or twenty water companies and may issue, as the evidence discloses it has done in this case, nearly Three Million Dollars par value of securities without Commission authority, simply because it was not a public utility, and immediately or shortly after, be recognized as a public utility and treated as such in consolidation proceedings, brought under the provisions of this same § 40 of the statute above quoted. In the instant case certainly no new corporation has been or is being created as the outgrowth of any of the transactions or proceedings thereof, since the Maine State Water & Electric Companies was an active, live going concern for several months before these proceedings were commenced, having purchased the stock of all these Petitioning Companies and acquired a controlling interest in the five other companies mentioned, sometime prior to the filing of the petitions in the case.

If the Maine State Water & Electric Companies, under its broad powers of incorporation, had, prior to the filing of these

petitions, become an operating company then it would have been a merger and not a consolidation which would be sought, and would seem then to be within the provisions of the statute.

The Commission, to be sure, has recognized, for purposes of consolidation, a company, though not a utility, organized expressly to take over the property of and to become consolidated with certain utilities; but never has the Commission gone so far as to recognize, for such purposes, a holding company which had already issued its securities and engaged in business, as a new company within the purview of the statute relating to "consolidation." In any event, we hesitate to go farther in this direction without legislative authority.

We have said that the Holding Company has issued nearly Three Million Dollars worth of securities. The evidence shows that there is outstanding a single 5 per cent bond dated December 1, 1928, due December 1, 1953, pledged as collateral security upon the indebtedness of the company in the principal amount of—

	$1,950,000.00
Preferred stock, 7,150 shares issued on a basis of $90 per share	643,500.00
Common stock, 50,000 shares of no par value figured on the basis of $5 per share	250,000.00
	$2,843,500.00

[3] We agree with counsel for the proponents in his conclusions of law in respect to the right of the Holding Company to acquire the stock of the Petitioning Companies and not being a public utility had the legal right to issue its stock, common and preferred, in any amount its directors saw fit, within the limits of its authorized capital and doubtless, not being a public utility, it had the further right to issue its bond or bonds in any amount limited only by its capacity to find a market therefor, without coming to this Commission for approval, all because it *was not a public utility,* and, therefore, not under the jurisdiction of the Commission, but in view of our statute, we feel that it is not consistent with the policy of the state of Maine for us to now recognize this Holding Company as a public utility for the purposes of these proceedings.

How barren would be this provision of law just quoted, and

how futile the efforts of the legislature in passing it, should the Commission recognize as a public utility a corporation organized as a Holding Company but with the right to become an operating company, if, while acting in its capacity as a holding company, it issues securities which it would have no right to do as a public utility, and then with the proceeds of such securities acquires, without Commission approval, capital stocks in other corporations which it would have no right to purchase or acquire as a public utility.

To grant these petitions and permit this consolidation under these circumstances would be repugnant to the entire spirit of the law governing the issue of securities in connection with the regulatory powers of the Commission. Fall River Gas Works v. Gas & E. L. Comrs. 214 Mass. 529, 102 N. E. 475.

Mobile Gas Company Case, 213 Ala. 50, P.U.R.1926C, 266, 104 So. 538.

While this feature alone is sufficient to give us good cause to hesitate, to say the least, and might in and of itself constitute a valid objection causing us to deny the petitions or to withhold the authorizing order required by the statute, there are nevertheless other considerations which appeal to us most strongly as compelling reasons for refusing to grant the prayer of the petitioner, which we will now discuss.

It will be seen that these petitioning companies were severally organized in nearly every instance by special act of the legislature to furnish water service in the particular locality where each existed, and the property which was then and has since been there created is dedicated to public uses right there in the particular community where it was organized. Each company was by law created for the purpose of furnishing a distinctly localized service, with the source of supply usually close at hand. We are now called upon to determine what useful purpose is to be served by permitting the property and franchises of the North Berwick Water Company, for example, down in York county, to become merged or consolidated with the Presque Isle Water Company away up in Aroostook county, separated by a distance of 354 miles and with numerous other companies wholly disconnected and incapable of ever becoming physically connected.

The proposal contemplates the formation of a gigantic water company, to perform exactly the same service now being rendered by these separate companies in precisely the same localities, where each is now rendering its independent service.

[4] The mere size, however, of the utility which will result from such a consolidation is of course no valid reason why we could condemn it, nor would the fact that it was looked upon by its promoters as a profitable venture make it objectionable, provided corresponding advantages would result or it appeared that there would be no disadvantage to the public service on this account.

Very little evidence was submitted to show in what respect there would be any particular advantage gained by the proposed consolidation. It is true that in answer to a question as to what advantages such consolidation would afford, one witness suggested quantity purchase of materials and equipment, common executive personnel, common accounting, and the benefit of the services of experienced engineers in developing these companies from an operating point of view, together with improved facilities and capacity to finance their operations. No evidence was presented to indicate that the consolidated company could render any better service to the public than that now being rendered by the several companies independently. The claim that savings might be effected in administration expenses was admitted to be a theory merely and not shown or demonstrated in any way. The evidence did show that the company when consolidated, in addition to its central office in Boston, would expect to maintain branch or divisional offices in Portland and Bangor, and the suggestion was made that there might be need for one in Aroostook county. These offices would of course have to be maintained at an additional expense and it is not plain to the Commission that any of the local offices could be dispensed with, since there would still be need for local superintendence, as administrative duties of a local nature would not be diminished. There was nothing in the case to show or is there any information within the knowledge of the Commission to indicate that the public, whether patrons of the several water companies involved or holders of securities issued in connection therewith,

was suffering from any financial stress or stringency on account of high rates of interest charge or lack of refunding facilities; on the other hand, it did appear that the companies were all financed at reasonably low rates of interest and had no difficulty whatever in floating their securities. The petitioners did not introduce any evidence neither did they apparently attempt to create the impression that any savings made on account of more modern or scientific methods of financing, or by reason of quantity purchases, or the availability of expert engineering advice, or because of any of the economies or advantages which they suggested, would in the end result in any marked improvement of service or establish any foundation for a reduction in rates. It is plain to see that separate books of accounts must be kept for each company just the same after consolidation as before. The fixed capital of each one of these present entities must not be allowed to become confused or scrambled into that of any of the others. The revenues and expenses must all be kept entirely distinct and separately reported to the Commission. Obviously, there would have to be many arbitrary allocations or apportionments of expense growing out of the common services proposed to be rendered, and it is not beyond the limits of reason to anticipate possibilities of practices prejudicial to the interests served, which it might be hard to check or adequately control in the exercise of the regulatory duties of the Commission, under the plan here proposed.

[5, 6] We think it is inimical to a sound public policy to permit water companies so widely scattered throughout the state, wholly incapable of being physically connected, entirely local in character, to become consolidated under the circumstances set forth in this case.

The interconnection of groups of electric companies is recognized by Commissions generally as a logical step in the development and use of electricity to make available to the public a source of surplus power to be absorbed into the system and to be transported where there is need therefor. Re Jersey Central Power & Light Co. (N. J.) P.U.R.1925D, 699; Re Associated Teleph. Co. (Ind.) P.U.R.1927C, 577.

Water service is not comparable at all with electric service, in P.U.R.1929E.

that the source of water supply must be reasonably close at hand and serves a local use, while electric current can be exchanged freely over long distances, supplying communities far distant from the power plant. Connecting electric companies is natural, logical, and advantageous to companies and consumers alike—not so with water companies—there is no such comparison.

In accordance with the trend of times, this Commission has recognized that such interconnection of electrical companies would result in more economical operation, and in consequent benefit to the public. Therefore, such petitions have been frequently granted and security issues have been approved to accomplish this purpose. Re Bangor R. & Electric Co. P.U.R.1925E, 705; Re Oxford Electric Co. P.U.R.1916D, 519; Re Central Maine Power Co. P.U.R.1916A, 415; P.U.R.1916B, 534; P.U.R.1918C, 792; P.U.R.1922C, 36.

The same reasons might extend to gas and telephone companies, but no such reason can be shown and no such policy has been established in this state for combining groups of widely scattered water companies, and such attempts as have been made in other jurisdictions have been generally discouraged by adverse Commission action which the courts have not seemed to disturb.

Almost this precise question has been quite recently passed upon by the Pennsylvania Public Service Commission, in Re Pennsylvania Water Service Co. P.U.R.1927E, 656, in which there appears a very comprehensive discussion of the principles as well as the policy applicable to the instant case. In the marked tendency of utilities toward consolidation and merger, which during the last two or three years has constantly increased, the Commissions of many jurisdictions have had occasion to deal with this question, but in only a few instances have the courts been called upon to consider the intricate phases of the various problems involved. Law professors and students of economics have contributed something to the discussion in expounding their theories, through articles published in magazines and law reviews.

One such article was cited by counsel for the proponents, the

only citation of authority offered by him in support of his able and comprehensive argument. This was an article by W. M. Wherry of New York state, entitled "Principles Applicable to Consolidation and Merger of Public Utilities," which appeared in the New York University Law Review, the January 1929 number.

The article dealt with the constitutional right of any public utility to own, manage, and dispose of its property in its own way without unwarranted interference by regulatory bodies. The author upheld and strongly commended the Maryland supreme court in overruling the Maryland Commission in the case of Electric Pub. Utilities Co. v. West, 154 Md. 445, P.U.R.1928C, 3, 11, 140 Atl. 840, where the Commission denied the petitions of four electric companies for authority to sell properties with an accompanying application for right to issue securities in connection therewith. In this case the Commission refused to grant the authority requested on the ground that it did not affirmatively appear in evidence that the public would be benefited by the change of ownership. The court, in reversing the order of the Commission in this case, says:

"It is not their province to insist that the public shall be benefited as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment."

The case was remanded to the Commission for further consideration, who again withheld their approval this time on the ground that "it would be detrimental to the public interest" to grant the petition, and stating that the holding company in this case was paying too high a price for the properties which would thus be overcapitalized. Re Electric Pub. Utilities Co. (Md.) P.U.R.1927E, 609.

The court again overruled the Commission, holding that "The question of capitalization of the holding company, which was a foreign company in this case, was not within the jurisdiction of the Commission."

(Court decision not yet reported on this case.)

We are not in full accord with the Maryland court, but rather

feel that some consideration should be given to the public interest under such circumstances as appear in that case.

A large majority of Commissions throughout the country, both prior to and since the Maryland case was decided, have taken the view that under conditions similar to those there shown, before granting authority for consolidation or merger, and for securities, it should be made to appear that it would be in the interest of public welfare or would to some extent serve the public interest, otherwise petitions in such proceedings would be denied.

Honorable William A. Pendergast, Chairman of the Public Service Commission of New York, in his opinion in the case of Ridgefield Electric Company, for authority to purchase stock of the Katonah Lighting Company, P.U.R.1925D, 317, 323, questioned whether the proposed purchase was *in the public interest* and after some discussion said:

"It would seem to me that for these reasons the *public interest* will not be promoted by the granting of the petition and, therefore, it should be denied."

See also Re Genesee Valley Gas Co. (N. Y.) P.U.R.1927B, 600, in which it was held that "a gas company would not be authorized to purchase the stock of an electrical company under the theory that *public benefit* will result in the uniting under common ownership and management companies which are deficient and incapable of much expansion and *remote* from other properties of the purchaser."

The New York Public Service Commission has also quite recently held in consolidation proceedings where electric companies were the subject of merger that the *public interest* requires the disapproval of the application unless it be shown that a "good and sufficient reason for the granting of the petition exists independent of the fair value of the property and that the *consuming public* will be benefited thereby." Re New York Power & Light Corp. P.U.R.1928E, 781, 786.

[7] The plan here proposed provides for placing a blanket mortgage on all these fifteen widely separated companies, and does not appeal to us as in accord with a sound public policy in the management of water utilities.

In Re Pennsylvania Water Service Co. (Pa.) P.U.R.1927E,

656, the Commission held that a proposed financial plan for consolidation which makes possible the placing of a blanket mortgage on widely separated water utilities was likely, in times of financial stress, to hamper and embarrass the component utilities and the service of these utilities to the public. With this thought we are inclined to agree.

In view of the considerations herein set forth we cannot see any sound economic reason to support the plan proposed by the petitioners, and believing that its operation would not be beneficial to the public interest, but instead would be detrimental thereto, we find that the prayer of the petitioners in these cases should be denied an the several petitions dismissed. Consequently, the accompanying application for approval of securities, which is dependent upon the result in the proceedings for consolidation, will also be dismissed but in a separate decree.

It is therefore

Ordered, Adjudged, and Decreed.

that the following petitions, viz.:

Eastport Water Company	U. #1046
Greenville Water Company	U. #1047
Guilford Water Company	U. #1048
Hartland Water Company	U. #1049
Mars Hill and Blaine Water Company	U. #1050
Mechanic Falls Water Company	U. #1051
North Berwick Water Company	U. #1052
Norway Water Company	U. #1053
Penobscot County Water Company	U. #1054
Presque Isle Water Company	U. #1055
Sangerville Water Supply Company	U. #1056
Skowhegan Water Company	U. #1057
Southwest Harbor Water Company	U. #1058
Stockton Springs Water Company	U. #1059
Waldoboro Water Company	U. #1060

for consolidation by means of conveyance of properties, franchises (except franchises to be corporations) and permits, with Maine State Water & Electric Companies, be and the same hereby are severally dismissed.

NEW HAMPSHIRE SUPREME COURT.

PARKER-YOUNG COMPANY et al.

v.

STATE.

BAKER RIVER LIGHT & POWER COMPANY

v.

STATE.

(— N. H. —, 145 Atl. 786.)

Statutes — Construction of inconsistent statute.

1. The latest of two conflicting statutes prevails, p. 166.

Statutes — Express repeal — Commission law — Power of selectmen.

2. The Public Service Commission law expressly repealing any prior acts inconsistent therewith has the effect of including any implied power which might previously have rested with selectmen regarding public utilities under a prior statute, p. 166.

Public utilities — Regulation by selectmen — Judicial capacity.

3. Regulation of public utilities by selectmen in the exercise of limited statutory powers given them is a purely judicial act and such officers, in the performance thereof, may not prejudicate any issue or bind themselves by promised action or refusal to act, but must act impartially upon evidence submitted, p. 168.

Consolidation, merger, and sale — Commission's refusal of consent.

4. The Commission is not authorized by law to deny a petition of one electric company to acquire other electric property because of the fact that town selectmen in the territory involved have refused the petitioning company's right to maintain structures in the highway, in view of the superior statutory powers of the Commission, p. 169.

Appeal and review — Questions open upon appeal.

5. The court, in reviewing findings of the Commission, must determine the validity of such findings upon the evidentiary facts upon which the justice and reasonableness of the order appealed from may depend, subject to the requirement that such findings are to be deemed prima facie lawful and reasonable, p. 169.

Appeal and review — Power of appellate court.

6. The court, in reviewing a Commission order, may remand the case to the Commission for rehearing or determine evidentiary facts in accordance with its own view, p. 169.

Appeal and review — Procedure on appeal.

7. The procedure upon appeal from, or review of, a Commission

order is what justice and convenience requires, except as limited by statutes; and where the good of the public and not the benefit to the contending parties is in issue, the desire or consent of the latter is not the test, p. 170.

Consolidation, merger, and sale — Proper evidence.

8. Comparison of rates, proposed by a company petitioning for authority to acquire electric property of another company, with rates of a company filing a similar petition, is proper and admissible evidence in such a proceeding, p. 172.

Consolidation, merger, and sale — Rate comparison as a factor.

9. The difference in rates proposed by rival petitioners for authority to acquire electric property is a material factor to be considered by the Commission in awarding the authority sought, p. 173.

[April 2, 1929.]

APPEAL, by unsuccessful petitioners for authority to acquire electric property, from an order of the Commission granting such authority to another petitioner; remanded to the Commission for further proceedings.

Petition by the Baker River Light & Power Company to acquire the electric utility property of Fox & Putnam. From reports and orders of the Public Service Commission granting the petition, the Parker-Young Company, Fox & Putnam, and E. B. Conant appeal. Remanded.

Appeals (1) by the Parker-Young Company and Fox & Putnam, and (2) by the Parker-Young Company and E. B. Conant, from the reports and orders of the Public Service Commission, both filed June 8, 1928.

The Parker-Young Company, hereinafter called Parker-Young Company, is a New Hampshire corporation having its principal place of business in Lincoln. Its business is primarily manufacturing, but it sells surplus electricity to the residents of that town. Fox & Putnam is a copartnership engaged in furnishing electricity to the people of the village of North Woodstock in the town of Woodstock, which adjoins Lincoln on the south. The Baker River Light & Power Company, hereinafter called the Baker River Company, is a New Hampshire corporation having its principal place of business at Meredith, and conducts a public utility business in Rumney, Warren, and Wentworth. It is a

subsidiary of the Utility-Power Company, which has a large hydroelectric development on the Pemigewasset river in Bristol and sells current at wholesale to municipalities and distributing companies in the central and northern parts of the state, including the Baker River Company. The Parker-Young Company and Fox & Putnam on June 1, 1927, filed a joint petition with the Public Service Commission for authority on the part of the partnership to transfer, and on the part of the company to purchase, the public utility business of said Fox & Putnam and to do an electric public utility business in Woodstock. A hearing was had thereon October 26th, and report filed November 3, 1927, 11 N. H. P. S. C. 208, denying the petition. A motion for rehearing by Parker-Young Company was filed November 18th and denied on November 23rd.

In the meantime, to wit, on October 27th, the Baker River Company had filed its petition for authority to acquire the electric utility property of Fox & Putnam, and to extend its lines to the towns of Campton, Thornton, and Woodstock and do a public utility business therein. Such a petition had been anticipated and considered in the hearings on the Parker-Young Company's petition. A hearing was had on the Baker River Company's petition on November 16th, and on November 23rd a report was filed granting the prayer thereof, and an order made authorizing said company to acquire the utility property of Fox & Putnam and to furnish electric current to the public of Woodstock and Thornton, also to the public of Campton not already supplied by other companies, and to construct and maintain pole lines and other necessary apparatus in said towns. A motion for rehearing by Parker-Young Company and E. B. Conant, a resident of North Woodstock and a user of electricity, was filed November 26th and denied December 6, 1927.

The two proceedings involving the same issue, namely, which of the two companies the public good required should be allowed to purchase the utility property of Fox & Putnam and conduct the utility business prayed for in the respective petitions, the counsel for all said parties agreed that the two cases, though separately tried, should be treated as one on appeal.

Fox & Putnam conduct the utility business as a side line, purchasing current of Parker-Young Company and maintaining its wires upon poles set and owned principally by the town. The service is admittedly poor. It appears to be conceded that either of the prospective purchasers is capable of rendering superior and adequate service. At the hearings there developed, however, a strong opposition to the Parker-Young Company and a like partiality for the Baker River Company. All the selectmen of Woodstock appeared in opposition to the petition of the former, and would not promise to grant pole locations, or to permit the company to continue its wires on the town poles if it acquired the property, basing their attitude on a vote of the town granting pole line rights to the Baker River Company. The selectmen and other prominent citizens of Woodstock appeared in support of the latter's petition, and the selectmen of all three towns expressed a willingness to grant the necessary pole locations. Petitions, counter petitions, and remonstrances were filed disclosing a somewhat divided sentiment, with a preponderance, however, in favor of the Baker River Company.

While much evidence was addressed to the comparative service promised, the rates to be charged, and other considerations material to the ultimate issue of the public good, the final conclusion of the Commission upon that issue was in each case expressly based upon the attitude of the public, but more particularly upon that of the selectmen as to pole locations.

Errors of both law and fact are claimed in each appeal. The evidence, findings, rulings, and orders, so far as deemed material, appear in the opinion.

Appearances: Demond, Woodworth, Sulloway & Rogers, and Jonathan Piper, all of Concord, for appellants; Murchie & Murchie and Alexander Murchie, all of Concord, for Baker River Company.

Snow, J.: The issue presented at the hearing before the Commission on the petition of Parker-Young Company and Fox & Putnam was whether the public good would be promoted by permitting the former to take over by purchase the utility business and property of the latter and to carry on the manufacture and

distribution of electrical energy in the town of Woodstock. The Commission stated its conclusion as follows: "On account of the attitude taken by the public in North Woodstock and the selectmen of the town, we feel that the petition must be denied. If it were granted, it would be ineffective unless the selectmen would grant the new owners a location for its poles in the highways. This Commission has no jurisdiction over granting these locations, that matter being entirely in the hands of the selectmen of the town. Without such locations, the company could not render service, and, therefore, an order from this Commission permitting it to do so would be futile." (11 N. H. P. S. C. 208, 212). It is apparent that, in the denial of the petition, controlling importance was given to the announced refusal of the selectmen of Woodstock to grant Parker-Young Company pole locations. In the Commission's report upon the later petition of Baker River Company for like authority, the expressed willingness of the selectmen of the three towns there involved to grant that company pole locations is recited by the Commission as a ground for its favorable finding, showing that like force was given to the supposed power of the selectmen to grant or withhold licenses at their pleasure. That the controlling weight accorded to the attitude of the selectmen was common to the consideration of both petitions is further shown by the fact that the Commission's conclusion was expressly attributed to a rule of procedure, namely: "At the hearing on any such petition, the petitioner will be required to file certified copies of records showing that the necessary license or licenses, easement or easements to enable the petitioner to engage in business in the town or city in question have been granted." Rules of Procedure, Public Service Commission 15. (11 N. H. P. S. C. at p. 213). The citation of this rule as the basis of its findings, as well as repeated remarks of the chairman during the course of the hearings, shows that the Commission regarded a preliminary assurance of the selectmen of their favorable action as a sine qua non to a finding for a petitioner.

Unless selectmen of towns have power, regardless of the order of the Commission, to grant or to refuse licenses for pole locations, and are bound by their advanced pledges to issue or with-

hold the same, there was error in the ruling which gave controlling weight to the promises and refusals of these officers. That the selectmen have no such power, and are not so bound, cannot be open to doubt.

Such powers as the selectmen have with respect to public utilities rest on P. L. chap. 97. By this statute the erection and maintenance of poles and structures in highways for the support of electric and other wires are forbidden, except upon a license from the selectmen of the town through which the proposed line is to pass locating the route thereof and fixing their size, location, etc. The selectmen are given powers to limit the duration of such license, to change the terms and conditions thereof, and to revoke the license whenever the public good requires. This statute, so far as here material, is a re-enactment of P. S. chap. 81, §§ 1, 2 (1891), which preceded the establishment of the Public Service Commission. Laws 1911, chap. 164. The provisions of P. S. chap. 81, were designed to regulate and control the use made of highways for utility purposes, so that such use may not unduly interfere with the other public uses to which the highways are dedicated. American Loan & Trust Co. v. General Electric Co. 71 N. H. 192, 200, 51 Atl. 660. It confers no express power upon the selectmen to determine who may and who may not occupy the highway with poles and wires, nor to choose between two utilities competing for the right. Any such authority which selectmen may have originally possessed under the statute arose by implication, as an incident to the general control of highway uses, and has been superseded by the express provisions of the Public Service Commission Act. Laws 1911, chap. 164. By this act the legislature undertook by comprehensive provisions to institute a new system for the establishment and control of public utilities in the state. It created the Public Service Commission as a state tribunal imposing upon it important judicial duties and endowing it with large administrative and supervisory powers. Section 13(a) of the act provided as follows: "No public utility shall commence within this state the business of transmission of telephone or telegraph messages or of supplying the public with gas, electricity, or wa-

ter, or shall engage in such business or begin the construction of a plant, line, main, or other apparatus or appliance intended to be used therein in any city or town in which at the time it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise hereafter granted (or any franchise heretofore granted but not heretofore actually exercised) in such town, without first having obtained the permission and approval of the Commission. The Commission shall grant such permission whenever it shall, after due hearing, determine and find that such engaging in business, such construction or such exercise of the right, privilege, or franchise would be for the public good and not otherwise; and may prescribe such terms and conditions upon the exercise of the privilege granted under such permission as it shall consider for the public interest." Section 21 provided that: "All acts and parts of acts which in any way conflict with the provisions of this act are repealed so far as they do so conflict." The former section has since been retained without material modification. P. L. chap. 240, §§ 21, 24.

[1, 2] This act clearly confers upon the Commission the exclusive power, subject to appeal, to find whether the public good requires that a petitioning utility shall be permitted to engage in business and allowed to construct its lines in any city or town; and by consequence to determine to which of two or more competing utilities the grant of such rights will best subserve the public good. Like power invested in local town officers would be inconsistent with the power here expressly bestowed on the Commission. Without any repealing words, the later act must prevail when it is so inconsistent with an earlier one that both cannot be operative at the same time. State v. Otis, 42 N. H. 71, 73. This principle in applicable where "two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature coexist." Daw v. Metropolitan Board of Works, 12 C. B. (N. S.) 161, 174; Eaton v. Burke, 66 N. H. 306, 312, 22 Atl. 452. See Opinion of Justices, 66 N. H. 629, 668, 33 Atl. 1076; Jones v. Concord & M. R. Co. 67 N. H. 234, 238, 30 Atl. 614, 68 Am. St. Rep. 650.

The subsequent inclusion of both the statutes under discussion in the recodification of 1925 (P. L. 1926) does not change the legislative intent to be inferred from their sequence. The exclusive power of the Commission is not, however, dependent upon a repeal by implication. Section 21, chap. 164, Laws 1911, expressly repealed "all acts and parts of acts which in any way conflict" therewith "so far as they do so conflict." This would seem to be sufficiently broad to include any implied power that may theretofore have rested with the selectmen under P. S. chap. 81, since the two provisions would be in manifest conflict. It is inconceivable that the legislature could have intended that the Commission's permission to a public utility to do business in a given territory could be annulled by obstructive action by a local board in any one of the several towns through which the utility had been authorized to extend its lines. Such a result would defeat the apparent purpose of the legislature to provide for uniform treatment and control through a single state tribunal of utilities operating in several municipalities.

It by no means follows, however, that the duties of the selectmen are rendered perfunctory by transferring from them to the Commission such incidental power as they may formerly have possessed to determine the question whether a given utility may do business in their town or what particular utility can best serve the public. It is their function to so regulate and control the use to be made of highways by any utility which may be permitted to occupy them that such use will not unduly interfere with other public uses. To the accomplishment of this end, by the proper location of the route and appliances, the powers of the selectmen remain supreme, subject only to appeal to the superior court by any party aggrieved. As suggested in argument, the situation is analogous to that with reference to street railways. The legislature or the court having decided upon the general route over which the railway can operate, the selectmen are given authority in their control of public highways to make the route specific. But this limited authority in the hands of the selectmen does not give them authority to control or alter the decision of the fundamental question of the public good by the legislature

or the body to whom the legislature has committed it. Attorney General v. Derry & P. Electric R. Co. 71 N. H. 513, 515, 53 Atl. 443. It was there said: "In the case of a railway corporation formed under the general law (Laws 1895, chap. 27), the question of the need of a railway over the general route proposed is determined by the court upon petition. This question is properly termed a 'fundamental' one in petition of Nashua Street Railway, 69 N. H. 275, 276 [41 Atl. 858], while the laying out of the way is said to be subsidiary. The controlling consideration in the proper determination of both is the public good. When, however, the legislature grants a special charter for a railway over a route described in general terms, and empowers some other tribunal to make the route specific and definite, it does not consolidate the two questions and authorize the latter tribunal to decide both. Concord v. Concord H. R. Co. 65 N. H. 30, 37 [18 Atl. 87]."

[3] If in a given case the Commission considers that the determination of the fundamental issue of the public good depends upon the petitioner's securing the grant of a particular route or pole location, and if there be doubt as to whether such route or location will unduly interfere with the other public uses to which the highway is dedicated, such doubt cannot be solved by the anticipatory promise or refusal of the selectmen with respect thereto. Whatever may be the extent of the selectmen's powers under P. L. chap. 97, in the exercise of such powers the selectmen act solely in a judicial capacity, and in the performance of their judicial duties are bound to act impartially upon the evidence submitted upon any petition thereunder when it shall be presented. They may not prejudicate any issue, and cannot bind themselves by any promised action or refusal to act. Meredith v. Fullerton, 83 N. H. 124, 129, 130, 139 Atl. 359, and cases cited. In the supposed contingency each tribunal is called upon to perform its duty as it sees it when the issue is fairly presented to it, and neither is responsible if for some legitimate reason its order is impossible of execution. The procedural rule of the Commission not only reverses the logical order of proceedings, but is unsound, in that it requires a judicial tribunal

to prejudge the merits of issues upon which it is required to keep an open mind until it is called upon to act.

[4] It is manifest, therefore, that the finding as to the public good in each of the proceedings under consideration is based on error, and, therefore, affords no valid basis for the orders made.

Each of the petitioning companies, however, contend in argument that, notwithstanding the error at law, the competent evidence conclusively establishes its right to an order in its behalf; the Baker River Company asserting that it cannot be found by a clear preponderance of the evidence that the orders of the Commission are unjust or unreasonable; the Parker-Young Company claiming that upon the evidence the finding of public good must be resolved in its favor, since any other finding would be unreasonable, and that, accordingly, the cases should be remanded to the Commission with instructions that its petition be granted and that of its opponent denied. Questions as to the relative powers and functions of the court and Commission and of appropriate procedure are presented.

[5, 6] The final judgment of the court upon every appeal shall be a decree dismissing the appeal, or vacating the order complained of in whole or in part, as the case may be. P. L. chap. 239, § 18. In the perfection of a record upon which such final judgment may be made the court is invested with large discretionary powers. Primarily it has the duty of determining the validity upon the evidence of the Commission's findings of the evidentiary facts upon which the justice and reasonableness of the order appealed from may depend. (Grafton County Electric Light & P. Co. v. State, 77 N. H. 490, 504, 93 Atl. 1028), subject to the requirement that such findings are to be deemed to be prima facie lawful and reasonable. P. L. chap. 239, § 11. But if any such finding appears to be erroneous, the court in its discretion may remand the case to the Commission for a rehearing (Id. § 18; Grafton County Electric Light & P. Co. v. State, *supra,* 77 N. H. at p. 498, 93 Atl. 1028; Bolger v. Boston & M. Railroad, 82 N. H. 372, 378, P.U.R.1927B, 252, 134 Atl. 524), or it may determine the fact according to its view of the relative weight of the evidence (Grafton County Electric Light

& P. Co. v. State, 78 N. H. 330, 333, P.U.R.1917E, 345, 100 Atl. 668; Grafton County Electric Light & P. Co. v. State, 77 N. H. at pp. 506, 508, 93 Atl. 1028); in which latter event the Commission, in its further consideration of the case upon recommittal, will proceed as it would if such fact had been announced by it in the first instance (Grafton County Electric Light & P. Co. v. State, 77 N. H. 539, 542, P.U.R.1915C, 1064, 94 Atl. 193). If any essential fact has not been found, the case may be remanded for such finding. Grafton County Electric Light & P. Co. v. State, *supra*. When, however, sufficient facts have been verified or found to show that only one just and reasonable order can be made, the court may so rule and remand the case to the Commission for such further proceedings in accordance therewith as justice may require. Grafton County Electric Light & P. Co. v. State, *supra*.

So far as the cited cases afford a precedent, they sanction the general practice of postponing the consideration of the evidence by the court until findings of the public good and of the necessary supporting evidentiary facts, unaffected by error of law, have been made and certified by the Commission; in other words, until a completed record shall be presented upon which a final order of the court may be made either dismissing the appeal or vacating the order of the Commission. P. L. chap. 239, § 18; Grafton County Electric Light & P. Co. v. State, *supra*. See Boston & M. R. Co. v. State, 77 N. H. 437, 443, P.U.R.1915C, 25, 93 Atl. 306. This course of procedure is believed to best accord with the apparent design of the legislature that the fact of the public good, and the evidentiary facts upon which its determination is based, should ordinarily be found in the first instance by the Commission, whose experience and duties particularly qualify it for the task. Such a legislative purpose is evidenced by the prima facie value which the statute requires this court to give to the Commission's findings, and by the denial to the court of the power to vacate the Commission's order or decisions (except for error of law), unless the court be convinced of their injustice or unreasonableness by a clear preponderance of the evidence. P. L. chap. 239, § 11.

[7] The procedure, except as limited by the statute, is what

justice and convenience requires (Grafton County Electric Light & P. Co. v. State, *supra;* LaCoss v. Lebanon, 78 N. H. 413, 417, 101 Atl. 364), and must depend upon the circumstances of the particular case under consideration. The good of the public, and not the benefit to the contending parties, being the issue (Grafton County Electric Light & P. Co. v. State, *supra,*) the desire or consent of the latter is not the test. The public, as well as the parties, is entitled to a finding of the public good on a hearing without error of law. The extent to which the error may have affected the course of the hearing, in the submission, receipt, and consideration of the evidence, and in the resulting findings of the Commission, is the controlling factor.

A sufficient reason for remanding the present case for the refinding of the facts by the Commission lies in the character of the error and its possibly far-reaching effect. Here the error consisted not merely in a failure to find some essential fact, or the misfinding upon some subsidiary issue, but of a misruling which not only sustained the competency of the selectmen's negation of duty but gave thereto a controlling value upon the main issue of the public good. The official attitude of the selectmen was treated as conclusive of the rights of the parties. The hearings were conducted under a general rule of procedure by which the rights of one party were foreclosed and those of the other predetermined by the testimonial assertions of the selectmen as to their future official action. It is unimportant that the views of the Commission embodied in the rule, and repeated in its rulings, were honestly entertained and applied. Such prominence and weight were accorded to the rule that it is only fair to assume that the evidence upon other evidentiary facts did not receive that same fair judicial consideration which would have been accorded to them if such facts had been deemed valuable and perhaps decisive upon the main issue. Tangible proof of the effect of the error upon the other issues of fact is found in the Commission's denial of the Parker-Young Company's motion for a rehearing. The motion alleged that the evidence presented at the hearing upon its petition in respect to the Baker River Company's contemplated rates had been contradicted in important particulars during the intermediate hearing on the latter's peti-

tion, and that the later evidence with respect thereto lacked definiteness; and requested an opportunity to submit evidence of a substantial difference in the respective rates proposed by the two companies. The record tends to support these claims. The denial of the motion for a rehearing and of the request to submit new evidence was put upon the ground that such "evidence would in no way change or modify the facts upon which the Commission based its decision." One inference which may be drawn from this statement is that no disparity of rates would overcome the refusal of the selectmen to grant pole locations and the expressed public sentiment of the people of Woodstock. While the public sentiment was a proper consideration, the language of the findings indicates that the greater weight was put upon the attitude of the town officers. Except for the erroneous value and conclusive effect accorded the selectmen's evidence, it seems probable that the motion for a rehearing would have been granted. The motion definitely presented an issue of material importance which appears to have had inadequate consideration because of the error of law. The requirements of the statute (P. L. chap. 239, § 11) that the findings of the Commission shall be deemed to be prima facie lawful and reasonable, and its orders and decisions final except when unjust or unreasonable upon a clear preponderance of the evidence, were not intended to apply to findings which may have been thus affected by error.

[8] The evidence offered should have been received. As such evidence, when submitted, may lead to different conclusions than would be reached on the instant report, there is no occasion to pass upon the conclusiveness of the present record. The whole matter involved in the two petitions is, therefore, remanded to the Commission for reconsideration of the evidence already submitted, and for the receipt of any further evidence deemed material, and for a refinding of both the main and subsidiary facts. The latter should include "all facts which either party may request [as] essential to the presentation of all questions of law raised by any decision or order made." Grafton County Electric Light & P. Co. v. State, 77 N. H. 490, 498, 93 Atl. 1028, 1031.

The record discloses a divergence of opinion of counsel as to the evidentiary value which should be accorded to the disparity

of the rates which would be necessitated by the difference in the costs of construction under the respective plans of the two companies. As there is to be a further hearing, this question has been considered.

The prayer of the Parker-Young Company is to be allowed to do business in the town of Woodstock. Its evidence as to the cost of service was addressed to supplying the village of North Woodstock, but was accompanied with an expressed willingness to extend its lines to residents of that town so far as it is economically possible. It concedes that such extension might involve higher rates. The petition of the Baker River Company was for the right to do business in the towns of Thornton, Campton, and Woodstock, serving the country population of the Pemigewasset Valley for a distance of 15 miles, including the village of North Woodstock. It seems to be conceded by both companies that if the larger territory is accommodated, the additional cost of construction will necessarily call for higher rates than if service be confined to the village and administered from the Parker-Young Company plant, only 2 miles away. The difference in the cost of service as between the smaller and the larger development is in dispute. The Parker-Young Company claim that this differential is so large as to make it unjust and unreasonable that the inhabitants of the village should be thus burdened for the benefit of the few and scattered settlers of the lower valley. On the other hand, the Baker River Company claim that the necessarily larger rates will not be unreasonably burdensome to such villagers.

[9] In disposing of the Parker-Young Company's motion for a rehearing requesting an opportunity to submit evidence of a substantial difference in the proposed rates of the two companies, the Commission said: "As this new evidence and findings requested would in no way change or modify the facts upon which the Commission based its decision denying . . . petition, a rehearing would serve no useful purpose." (11 N. H. P. S. C. at p. 215.) One interpretation of this language, as we have seen, is that the conclusive effect given to the refusal of the selectmen to grant locations rendered valueless any evidence of the dis-

parity in rates. Counsel for Parker-Young Company, however, interpret the statement of the Commission as a ruling that the determination of the question of public good was in no way dependent on the additional cost of service to the people of North Woodstock of the larger development. If such was the intent of the statement of the Commission, its ruling was in error. The difference in the rates which the two developments would respectively impose upon the village users is clearly a material fact to be weighed with the other competent evidence addressed to the issue of the public good. The possession of the Parker-Young Company, to be inferred from its argument, that residents of North Woodstock village are entitled as a matter of right to the lesser rates, and that no burden of contributing to the service of the residents of the valley as a whole can be transferred to them, is equally in error. This contention loses sight of the fact that it is not the public good of the restricted territory alone, but of the valley as a whole and of all its constituent parts, that is in issue. The two petitions being considered together, the perspective of the triers must necessarily include the whole valley. Intervening municipal boundary lines are immaterial. The people of the village and those of the valley as a whole are each entitled to have their respective needs, together with the resulting advantages and disadvantages to the other, weighed in the determination of the principal issue. The latter have no right to accommodation which will unreasonably burden the former, nor have the former a right to the lower rates incident to a service restricted to the congested area if the whole valley can be served without an unreasonable increase of their rates. In other words, the villager has no arbitrary rights to the maximum advantage of his location, nor has the isolated farmer a right to any service at all if it will be unduly burdensome to others. The extent to which the maximum good of each must yield to that of the whole, and what difference in rates should bar the granting of service to the greater number, are pure questions of fact for the tribunal which for the time being is passing on the question. Upon this issue the trier may consider the prevailing tendency of the time, supported by public policy, to equalize or apportion so far as reasonable the advantages as between rural

and urban sections and to promote the growth and prosperity of the whole community involved; but against the advantage to the former must be weighed the cost to the latter, if it be substantial. Whether such equalization or apportionment is for the public good under the circumstances is a question of fact. The difficulties and complexity of the problem presented do not bar its solution. Like other difficult questions of fact, the issue of the public good, so far as it depends upon harmonizing the conflicting rights of the communities affected, must be decided by a conscientious weighing of the relative benefits and burdens which would be conferred and imposed upon each by the respective developments proposed by the two competing companies.

The considerations which enter into the determination of the public good are, of course, not limited to those which have been the subject of discussion, and the failure to mention others is not to be construed as either emphasizing the relative importance of the former or as limiting the field of inquiry.

The order is remanded.

Peaslee, C. J., was absent; the others concurred.

TENNESSEE RAILROAD AND PUBLIC UTILITIES COMMISSION.

RE TENNESSEE EASTERN POWER COMPANY et al.

[Dockets Nos. C-1, D-1.]

Certificates — Choice between applicants — Hydroelectric development.

1. Authority to develop a hydroelectric project was awarded, as between two companies, to that applicant proposing development of the natural resources of the estate to the fullest extent possible, taking into consideration the relative effect of the two proposals on the general economic, industrial, and social welfare of the state and its component communities, p. 188.

Eminent domain — Hydroelectric condemnation — Prior public use by utility.

2. The right of the state to award authority to a private company for the condemnation of riparian land for the development of a hydro-

electric project for public use cannot be thwarted by the fact that such lands might be already held by a rival company, itself seeking to devote such lands to public use in competition with the successful applicant, in view of the fact that such lands cannot be devoted to or impressed with a public use until such a time as the state Commission has granted a certificate of convenience and necessity and the Federal Power Commission has granted a permit therefor, p. 189.

Eminent domain — Right of private company to condemn for public use.

3. The fact that an applicant for a certificate of convenience and necessity to develop a hydroelectric project is not, at the time of making application, a public utility, does not operate to defeat the right of such an applicant, if successful, to acquire riparian land by condemnation, in view of the additional fact that it would, upon obtaining such a certificate from the State Commission and a license from the Federal Power Commission, then become a public utility and would thereupon have conferred upon it the right to condemn such lands for public use, p. 190.

Certificates of convenience and necessity — Hydroelectric development — Applications by private companies.

4. The state law requires all applicants for authority to develop water power within the state to obtain a certificate from the Commission regardless of whether or not they might be public utilities and regardless of whether or not they propose to devote the power to a public use, p. 190.

Monopoly and competition — Existing utilities — Hydroelectric development.

5. The fact that a public utility may own or operate properties within the state does not have the effect of giving it a superior right as an "existing" utility to pre-empt hydroelectric power sites of the state to the exclusion of all other applicants, p. 191.

[June 17, 1929.]

APPLICATIONS of two companies for certificates of convenience and necessity to construct and operate hydroelectric dams on the south fork of the Holston river; one application granted, the other denied.

By the **Commission:** (1) On May 4, 1928, the Tennessee Eastern Power Company filed its application with the Commission seeking to have issued to it a certificate of convenience and necessity authorizing it to construct a dam on the south fork of the Holston river in Sullivan county, immediately above the Hemlock bridge, and about eight miles down stream from the junction of the Watauga river and south fork of the Holston,

and also asking for certificates covering three other smaller projects on the South Fork of the Holston, known as Fish Dam, Bluff City, and Kingsport. Hearing on this application was held up due to the fact that the jurisdiction of this Commission had been challenged in the case of Tennessee Eastern Electric Co. v. Hannah, reported in 157 Tenn. 582, P.U.R.1929B, 218, 12 S. W. (2d) 372, in which the jurisdiction of this Commission as to the granting of certificates for the construction of dams and hydroelectric development in Tennessee was sustained by the Supreme court of Tennessee, in an opinion by that court on December 22, 1928.

(2) On December 31, 1928, the Holston River Power Company filed its application with the Commission seeking a certificate of convenience and necessity authorizing it to construct three dams on the South Fork of the Holston river, Dam No. 1 to be located about six miles above Kingsport, Tennessee, at a point just above the bridge of the C. C. & O. R. R.; Dam No. 2 to be located just below the confluence of the South Fork of the Holston and the Watauga rivers; and Dam No. 3 to be located on the south fork of the Holston about five miles above Bluff City.

On February 11th and 12th, 1929, a joint hearing was had on both of said applications before representatives of the Federal Power Commission and this Commission at its offices in Nashville, Tennessee. The Federal Power Commission was represented by Majors Glen E. Egerton, Lewis H. Watkins, and John F. Conklin, and also by C. M. Hackett and Joseph Wright from the United States District Engineer's office at Chattanooga. Both applicants were present by their officials and by counsel.

On March 26, 1929, a further hearing was had and testimony of an additional witness on behalf of the application of the Holston River Power Company was offered, namely, Mr. J. O. Hammitt. The hearing was thereupon concluded, and counsel for both parties have filed exhaustive briefs in support of both applications.

The notice given to these applicants fixing the date for hearing on said applications stated that where two or more applications are filed for the same site or sites, the Commission would give full consideration to all pertinent facts, including the relative

degree to which the applications conform to a comprehensive scheme of development on the river embracing the fullest practicable utilization of the water storage possibilities and head available; and that the financial ability of the applicant, the market for the disposition of the power intended to be generated, the industries which would likely be brought into the territory and established as a result of the construction, and other pertinent matters would be considered. In passing upon these conflicting applications, these matters must of necessity be considered to determine the strength or weakness of the respective applications filed by the Tennessee Eastern Power Company and the Holston River Power Company.

II

Identity of Applicants

(1) Tennessee Eastern Power Company

This company is a corporation organized under the laws of Massachusetts and domesticated in Tennessee, with an authorized capital stock of 90,000 shares no par value divided into 60,000 shares no par value voting common stock and 30,000 shares no par value voting prior lien common stock. The paid in capital stock of the applicant is 30,000 shares voting common stock and 15,000 shares voting prior lien common stock.

The Tennessee Eastern Electric Company, likewise a Massachusetts corporation, owns 30,000 shares of common stock in the Tennessee Eastern Power Company, subject, however, to an option of Henry L. Doherty & Company to purchase said 30,000 shares. Henry L. Doherty & Company likewise own 7,500 shares of the voting prior lien common stock with an option to purchase the remaining 7500 shares of said stock.

Henry L. Doherty & Company and/or Cities Service Company owns 70 per cent, or more, of the stock of the Tennessee Eastern Electric Company.

The Tennessee Eastern Electric Company holds the legal title by purchase of considerable acreage of land which will of necessity be used or flooded as a result of the construction of the Hemlock dam, but it does not appear that the Tennessee Eastern

Power Company owns any such lands. It does appear that certain additional necessary flowage lands may be under option by one or the other of these companies, both being subsidiaries of Henry L. Doherty & Company or Cities Service Company. Both the Tennessee Eastern Electric Company and the Tennessee Eastern Power Company are controlled by Henry L. Doherty & Company or the Cities Service Company in the manner above detailed. It appears from the record that the Tennessee Eastern Electric Company began acquiring these riparian lands about March, 1925, and continued thereafter the acquisition thereof.

(2) Holston River Power Company

The Holston River Power Company is a corporation organized under the laws of the state of Tennessee with a capital stock of $100,000, 10 per cent of which is owned by the American Cyanamid Company, and the remaining 90 per cent is under option to the American Cyanamid Company.

The Holston River Power Company filed its application with the Federal Power Commission on December 2, 1922, for a preliminary permit embracing the sites covered by its application in this proceeding. Tennessee Eastern Electric Company filed its application with the Federal Power Commission on the 29th day of June, 1926. So far as the record in this case discloses no application has ever been filed with the Federal Power Commission covering these sites by the Tennessee Eastern Power Company.

III

Financial Ability of the Two Applicants

From the foregoing, it will be seen that both applicants—Tennessee Eastern Power Company and the Holston River Power Company—are in fact subsidiaries of other companies. The Henry L. Doherty & Company and/or Cities Service Company, by virtue of its stock ownership or option to purchase is in position to own or control the Tennessee Eastern Power Company, whereas the American Cyanamid Company, by virtue of its stock ownership and option to purchase, is in position to own outright the Holston River Power Company. As regards the applicants,

Tennessee Eastern Power Company and Holston River Power Company, as separate corporate entities, neither of these companies in and of themselves are sufficiently able to finance the projects covered by their respective applications. On the other hand, the Commission finds that both Henry L. Doherty & Company, back of the one applicant, and the American Cyanamid Company, back of the other applicant, are abundantly able financially to carry on to a successful completion the projects covered by the respective applications.

IV.

The Dams Proposed to be Constructed

(1) Tennessee Eastern Power Company

The Tennessee Eastern Power Company, by its application, proposes to immediately construct the Hemlock dam above the Hemlock bridge in Sullivan county; and on the hearing of this case it was disclosed that this company proposes to construct the Fish dam, Bluff City, and Kingsport projects at such time or times, after construction of the Hemlock dam, as the power demands of the Henry L. Doherty affiliated companies require such construction, depending upon the growth, development, and demands of the territory served; and that it is the purpose of the Tennessee Eastern Power Company to serve the Henry L. Doherty associated companies in that territory and also to furnish energy to interconnecting companies; but a sufficient market and demand is not shown at this time by this applicant to consume the entire amount of power that would be generated by the construction of the Hemlock dam. Neither is there a showing to the effect that all the energy that could be generated at the Hemlock dam would in the near future be necessary to meet the reasonable demands of the company or the requirements of the territory to be served, taking into consideration all anticipated growth and development that may reasonably be expected in this territory; and it is evident from the record in this case that the Tennessee Eastern Power Company does not anticipate that it will be necessary for some years to construct either the Fish dam, Bluff City, or Kingsport projects, and that this application was

made to cover these three sites in an effort to embrace a comprehensive scheme of development on the river so as to comply with the requirements of this Commission and the Federal Power Commission, and to reserve these sites to the applicant and to the Henry L. Doherty interests for any possible future development.

The witness, C. W. Saathoff, chief construction engineer for Henry L. Doherty & Company, testified for the Tennessee Eastern Power Company on the hearing of this case and filed as an exhibit a report made by him to the Doherty Company, which shows that the reservoir created by the construction of the Hemlock dam, 100 feet high, at the point designated in the application of the Tennessee Eastern Power Company, will have a surface area of about 2,000 acres and will back the water up the south fork of the Holston river to its confluence with the Watauga, and thence up the Watauga about six miles, and up the south fork of the Holston about seven miles above its junction with the Watauga.

The Bluff City project, under the plan proposed by the Tennessee Eastern Power Company, would be built at a location above the reservoir created by the construction of the Hemlock dam so that it would not, as thus constructed, utilize the full potential capacity of the river, but would leave a head of approximately 40 feet which would not be utilized under this plan.

The next project upstream proposed by the Tennessee Eastern Power Company is the Fish dam. The location of the Fish dam of the Tennessee Eastern Power Company is such that it would not utilize the available head of the river, but would leave approximately 90 feet of head which would not be utilized between it and the Bluff City project.

The other small project proposed by the Tennessee Eastern Power Company is the Kingsport project which would be downstream from the proposed Hemlock project and would destroy the site of Dam No. 1 proposed by the Holston River Power Company in its conflicting application for its Dam No. 1.

(2) Holston River Power Company

The Holston River Power Company proposes the construction

of Dam No. 1 at a point about six miles above Kingsport on the south fork of the Holston, which would create a reservoir that would back the water up to a point immediately below the confluence of the south fork of the Holston and the Watauga, at which point it is proposed to build the second dam of the Holston River Power Company. This second dam would get the benefit of the head water from both rivers. The second dam of the Holston Company would be approximately one hundred and thirty-five feet high, which would give a large storage capacity and would back water up the south fork of the Holston river approximately twenty miles, and up the Watauga river fifteen miles, thereby utilizing the high available head of the Watauga river.

Immediately above the back water from Dam No. 2, proposed by the Holston River Power Company and on the south fork of the Holston river, said company proposes to build Dam No. 3, which would be approximately one hundred and thirty feet high, and would back the water up the south fork approximately forty miles.

These three dams proposed by the Holston River Power Company, thus constructed, would, in the opinion of this Commission, utilize practically all available potential water power between the location of Dam No. 1 and the upper limits of the back water from Dam No. 3, and would be the most economical and comprehensive development of the river as a whole as between these two applicants.

The development of the river at the sites proposed by the Holston River Power Company coincide practically with the recommendations made by the Government engineers for the development of the river as a whole as regards power development, storage, flood control and navigation. The sites proposed to be developed by the Tennessee Eastern Power Company would not utilize to the fullest extent the potential water power of the stream as a whole, but would leave gaps in the river where there would not be a sufficient amount of water to provide for all-year round navigation nor would it utilize all of the available head or storage areas. The application of the Tennessee Eastern

Power Company, if approved, would authorize "patch-work" or "spot" development; whereas the application of the Holston River Power Company, if approved, would be best adapted to develop, conserve, and utilize, in the public interest, the navigation and water resources of the river.

V.

Necessity for the Power—Its Proposed Use

(1) The Tennessee Eastern Power Company

Henry L. Doherty & Company or Cities Service Company owns and operates numerous affiliated utilities in upper East Tennessee adjacent to the territory in which the proposed developments would be located. These utilities are connected with transmission lines and are supplied with energy from the various hydro and steam plants in that territory. It is proposed to use the energy generated at the Hemlock site for utility purposes by furnishing energy to all of the subsidiary companies of Henry L. Doherty & Company operating in upper east Tennessee and adjacent territory. The power demand of the various utilities at this time is being taken care of by the developments already installed and the future requirements of these utilities, considering anticipated growth and demand, would utilize only a portion of the available power that would be developed at the Hemlock site; and none that might be developed at the other three sites applied for by the Tennessee Eastern Power Company.

On the hearing of this case it was brought out in the proof that the Tennessee Eastern Power Company proposes to sell a portion of the energy that might be generated at the Hemlock site to the American Gas & Electric Company, and other connecting companies, which, in turn, would distribute this power outside of the territorial limits of the state of Tennessee for the benefit and use of outside customers.

(2) Holston River Power Company

On the hearing of these applications, it developed that the Holston Company proposed to erect the three dams covered by

its application and to sell all of the power generated at said dams, except such amount as the Commission might require to be distributed for utility purposes, to the American Cyanamid Company, and that the latter company proposes to build in that immediate territory an electrochemical industry and an electric furnace plant which would utilize the bulk of the power which these developments would produce.

Mr. J. O. Hammitt, vice president of the American Cyanamid Company, testifying on the hearing of this case, stated that his company, although it is an American company and has large investments in the United States, does not have an electric furnace plant in the United States, but that a large part of the market for the electric furnace products is in the United States; and that after the engineers of his company has surveyed a number of possible locations for an American electric furnace plant, no location appeared to have greater advantage than a location in eastern Tennessee, and that for that reason his company acquired an interest in the Holston River Power Company with an option to purchase the remainder of the capital stock of said company.

It appears from the proof that electro-chemical industries are vital to this country, that their products are essential raw materials upon which important branches of American industry depend; that without the production of electro-chemical industries, no country could long support a war of national defense; that such industries must depend upon cheap electric power and that because of the fact that available power sites are being so rapidly pre-empted for public utility demands, American capital is building these important industries in foreign countries. It further appears that the development of the American Cyanamid Company in the Western Hemisphere is in Canada, and that the Aluminum Company of America is building a large development in Canada and that the Union Carbide Company is building for its own use a large water power development in Norway. It further appears that these electro-chemical industries must build their plants and furnaces close to the point of generation of the

power, because they cannot pay the cost of transmission of power over long distances from the point of generation.

This witness further testified that engineers of his company had explored the mountains of eastern Tennessee and had shipped samples of mineral products from there to the plants of the company for analyses and tests; that the mountains of that section of Tennessee are wealthy in undeveloped resources, and any plan by which the power possibilities of an important tributary of the Tennessee river are exploited, would, in the long run, prove contrary to public policy; that as a result of investigations made by the engineers these power possibilities of the south fork of the Holston river would be spoiled by the construction of a dam, as proposed by the Tennessee Eastern Power Company at the Hemlock site, or by carrying out any plan that leaves undeveloped gaps in the river and renders them incapable of development because of the investment at sites selected without regard to the full power and navigation resources of the stream; that such a "spotty" and incomplete development would never open up the wealthy undeveloped territory in eastern Tennessee.

This witness further testified that it had been stated by one of the Government engineers that 9-foot navigation could be developed on the Holston river below Kingsport. This witness stated that such navigation could be utilized and would be an important factor in bringing wealth-producing industries to eastern Tennessee. We find all these statements of this witness to be true.

Mr. Hammitt further testified that his company, in connection with this proposed industrial development, would use vast quantities of coal, limestone rock, and other raw materials which can be found in the territory adjacent to the proposed development, and that the American Cyanamid Company would make an investment in that immediate territory of from eighteen million to twenty million dollars in plant, and, when the same is put into operation, would employ a payroll of two thousand to twenty-five hundred men in the immediate vicinity, which would bring a population of around eight thousand into the territory, and that

in connection with a payroll of this sort, a very large percentage of native labor could and would be used. This investment referred to by this witness does not include the investment that would be made by the Holston Company in the construction of dams, power houses, etc., but is in addition thereto. The result would, of course, be that the taxable property would be increased to the extent of the value of the industrial development with all the attendant increases in property, and other enterprises which would be necessarily attracted to the development, all of which would likely run from thirty to forty million dollars, and none of which would be brought into the territory if the sites are granted to public utility companies which would transmit the power generated to developments already made or to distant places for distribution.

While the Tennessee Eastern Power Company insists very strenuously in the brief filed by its able counsel in this case that the American Cyanamid Company does not agree in this record to finance the proposed development of the Holston Company, or to use any of the energy generated by it, we have no doubt but that the application is made in good faith and that the American Cyanamid Company will immediately get back of the project and see that it is carried through to a successful completion as soon as all obstacles are removed, so that work can be begun.

In fact, the Holston Company is in practically as satisfactory position in this regard as is the Tennessee Eastern Power Company, because they are both separate corporate entities, and neither the American Cyanamid Company nor Henry L. Doherty & Company is a party to this proceeding, nor does either of the said companies join in the application for certificate, so that no action which this Commission could take would bind either the American Cyanamid Company or Henry L. Doherty & Company to see to it that the proposals of the Holston Company or the Tennessee Eastern Power Company are carried through to completion.

With reference to procuring power from other sites, it developed on the hearing of this case that the American Cyanamid Company could only locate its electro-chemical plants at a site

where it could procure sufficient power to meet its demands and where it could be generated as cheaply as possible and where the industrial development, in the way of electric furnaces, electrochemical plants, etc., could be made immediately adjacent to the water power development, so that the heavy cost of transmission and attendant loss of power thereby would be eliminated.

This being true, the American Cyanamid Company must look to a very limited field for its power, whereas the Tennessee Eastern Power Company and its affiliated companies are not so limited. In fact, this record discloses that the Tennessee Eastern Electric Company, which is a subsidiary of the Henry L. Doherty & Company, as before shown, has applications pending before the Federal Power Commission for permits to construct dams on the Nolichucky river where said company already has a hydroelectric development. At any rate, there are other available water power sites which could be utilized in this immediate territory to meet any needs of the Tennessee Eastern Power Company for years to come.

With a certificate granted to the Holston Company and the power generated disposed of to the American Cyanamid Company, as proposed, there never would be any shortage of power in the territory affected, provided all available sites are developed; but there would be enough power generated to supply the demands of every farm house and every industry that might be brought into the territory. The great need is a market for the power that can be generated and to have such a market we must have industries to use it.

The record in this case shows that the Holston Company through the American Cyanamid Company would operate twenty-four hours to the day the year-round and would use all the primary power generated except what is distributed to the public under orders of this Commission; whereas the very nature of the public utility business is such that its demand for power fluctuates and hence the Tennessee Eastern Power Company in this case would not use all of the power that would be generated by the total installation 100 per cent of the time.

VI.

Summary

[1] As between these two rival applicants, we find that the Tennessee Eastern Power Company proposes to immediately build one dam about six miles above Kingsport at the Hemlock bridge, and later proposes to build three others, known as Fish dam, Bluff City, and Kingsport, as and when the power demands require such additional construction; that it proposes to distribute the power generated at the Hemlock dam to the associated Henry L. Doherty & Company organizations in upper east Tennessee and sell some to other interconnecting companies for transmission and distribution into other territory; and that it has no market now, or to be presently anticipated, for all of the power that would be generated at the Hemlock dam; that if all four dams were built, under the plan proposed by the Tennessee Eastern Power Company, such construction would not conform to the recommendations made by the engineers of the United States Government for a full utilization of the available potential water power on the river, but such construction and development would leave certain portions of the river undeveloped, and would leave the head in certain places unused.

With reference to the proposed development of the Holston Company, this development calls for immediate construction of three dams so located as to more nearly conform to the recommendations of the United States Government engineers and to use practically all potential available water power in the stream without any "spot" or "patch-work" development; and the Holston proposal is better suited for economical continuous and comprehensive development of the river as a whole, for it would conserve and utilize the water power resources of the river to the best interest of the public in that it would develop more power and give better control for storage regulation, thereby greatly benefiting power projects located on the rivers into which the Holston flows; and also it would promote flood control and navigation.

In addition to these advantages, the plan proposed by the

Holston Company and backed by the American Cyanamid Company, would bring into this territory the large industrial development, heretofore referred to, with great increase in taxation, the employment of a payroll of two thousand to twenty-five hundred people, and this new industrial development would use vast quantities of coal, limestone, and other natural resources.

The Holston Company would bring into the territory and create with the development its own market for the power generated at the three dams proposed by it; while the Tennessee Eastern Power Company would be compelled to depend upon unexpected and unanticipated growth of the community and the transmission of the power to other communities in order to hope to dispose of all the power which could be generated at its proposed dams.

VIII.

Questions of Law Involved

[2] It is insisted by the Tennessee Eastern Power Company that since it, or the Tennessee Eastern Electric Company both controlled by Henry L. Doherty & Company, owns a considerable portion of the lands on both sides of the river at and above the proposed location of the Hemlock dam, its riparian rights can not be taken away from it by a rival company because these lands were acquired for the purpose of having them devoted to a public use by the construction of the proposed Hemlock Dam.

The answer to this contention is that these lands are held just as any other lands along the river are held by any private individual. They can not be devoted to or impressed with a public use until such time as this Commission has granted a certificate of convenience and necessity and until such time as the Federal Power Commission has granted a permit, followed by a license, authorizing the construction of a hydro-electric development. The present owner acquired these lands charged with knowledge of the fact under the law that such certificate and license would have to be first obtained before these lands could be devoted to a public use. The fact that the Tennessee Eastern Electric Com-

pany happens to be a public utility at other localities in Tennessee does not clothe it as the owner of these lands with any of the functions or prerogatives of a public utility at this location, because said lands are not used or useful in the public service at this time and can not become so used or useful until after a certificate has been issued by this Commission and a license by the Federal Power Commission.

[3] The Tennessee Eastern Power Company contends that even if a certificate were issued to the Holston Company by this Commission and a license were issued to it by the Federal Power Commission, that the Holston Company could not acquire these riparian rights by condemnation, for the reason that the Holston Company is not a public utility. The Holston Company is incorporated under a charter authorizing it to make water power developments on the south fork of the Holston river, and also authorizing it to condemn land for that purpose. It is true that this company is not at this time as to such proposed development a public utility, but if it should be granted a certificate by this Commission and a license by the Federal Power Commission, it would then become a public utility, and as such under these grants and under its charter, it would have conferred upon it the right to condemn these lands and be clothed with the power of eminent domain.

The contention is made by the Tennessee Eastern Power Company that the Holston company would not even then be a public utility, because it proposes to sell all or the major portion of its power to the American Cyanamid Company and not to distribute it to the public generally.

On the hearing of this case and in the application for a certificate filed by the Holston Company, it appears that said company agrees, if a certificate is granted to it, to distribute such power as this Commission may require for public utility purposes, which would thereby make it a public utility.

[4] Notwithstanding these contentions made by the Tennessee Eastern Power Company, the Act of 1923, Chapter 87, re-

quires that any party desiring to make water power developments on the streams of the state shall file application with the Commission for a certificate of convenience and necessity and that such certificate shall be granted before such party shall be permitted to make such development, the intention of the Act being to prevent exploitation of water power and other natural resources. Under the terms of the Act, such application would have to be filed with this Commission, regardless of whether the applicant is a public utility, or not, and regardless of whether it proposes to devote the power to a public use.

[5] The Tennessee Eastern Power Company contends that it has a right to make its proposed developments under authority of the Act of 1923, above referred to, on the theory that such development is merely an extension of an already existing utility operation. This contention is, of course, unsound, because the Tennessee Eastern Power Company has no utility operation anywhere. Even if the application had been made by the Tennessee Eastern Electric Company, which does have a development on a different water-shed over on the Nolichucky river, and serves the public as an operating utility, such company would not fall within the exceptions contained in the Act of 1923. If this could be considered an extension of an existing utility there is not a power site located on any stream in the state of Tennessee which could not be pre-empted by some other operating utility, because there is not a county in the state which is not already served by or adjacent to some operating public utility which could claim that it was only making an extension to its existing plant, and thereby any given power site on any stream of the state could be thus bottled up. To uphold the contentions of the Tennessee Eastern Power Company in this regard would be to prostitute the state's water power sites and her sovereign jurisdiction over them to the operating utilities of the state. They could very easily go out and acquire land on both sides of a river adjacent to a proposed dam and then contend that they had a right to erect the dam as an extension to an existing utility, without regard to the sovereign rights of the state or of the

United States, and without making any application to this Commission or the Federal Power Commission.

All of these contentions are patently and obviously unsound, and their very statements carry their own refutation. The object of the law is to protect these potential water power sites and natural resources and make them available as soon as a comprehensive development can be had or is offered by an applicant who can make the development.

VIII.

Conclusion

In view of the foregoing observations, we conclude that the best interests of the state will be served by denying the application of the Tennessee Eastern Power Company and granting the application of the Holston River Power Company covering these sites referred to, and that no particular violence or injury will be done to the Tennessee Eastern Power Company, or its associated companies, or to the companies of which it is a subsidiary, because there are other available sites that can be developed to meet all the requirements of the Tennessee Eastern Power Company and its associates, allowing for unprecedented growth and development.

In concluding this opinion we deem it entirely proper to state that in considering these conflicting applications the Commission has found invaluable the maps and data so carefully prepared by the able engineers of the United States Government as a result of their study of the power possibilities of the Holston river and its tributaries, which information was furnished by the engineers and made a part of the record in this case.